EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1913

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

(IN TWO VOLUMES.)

HARRY G. KING and MARIA J. KING, His Wife,
Appellants,

vs.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,
Appellees.

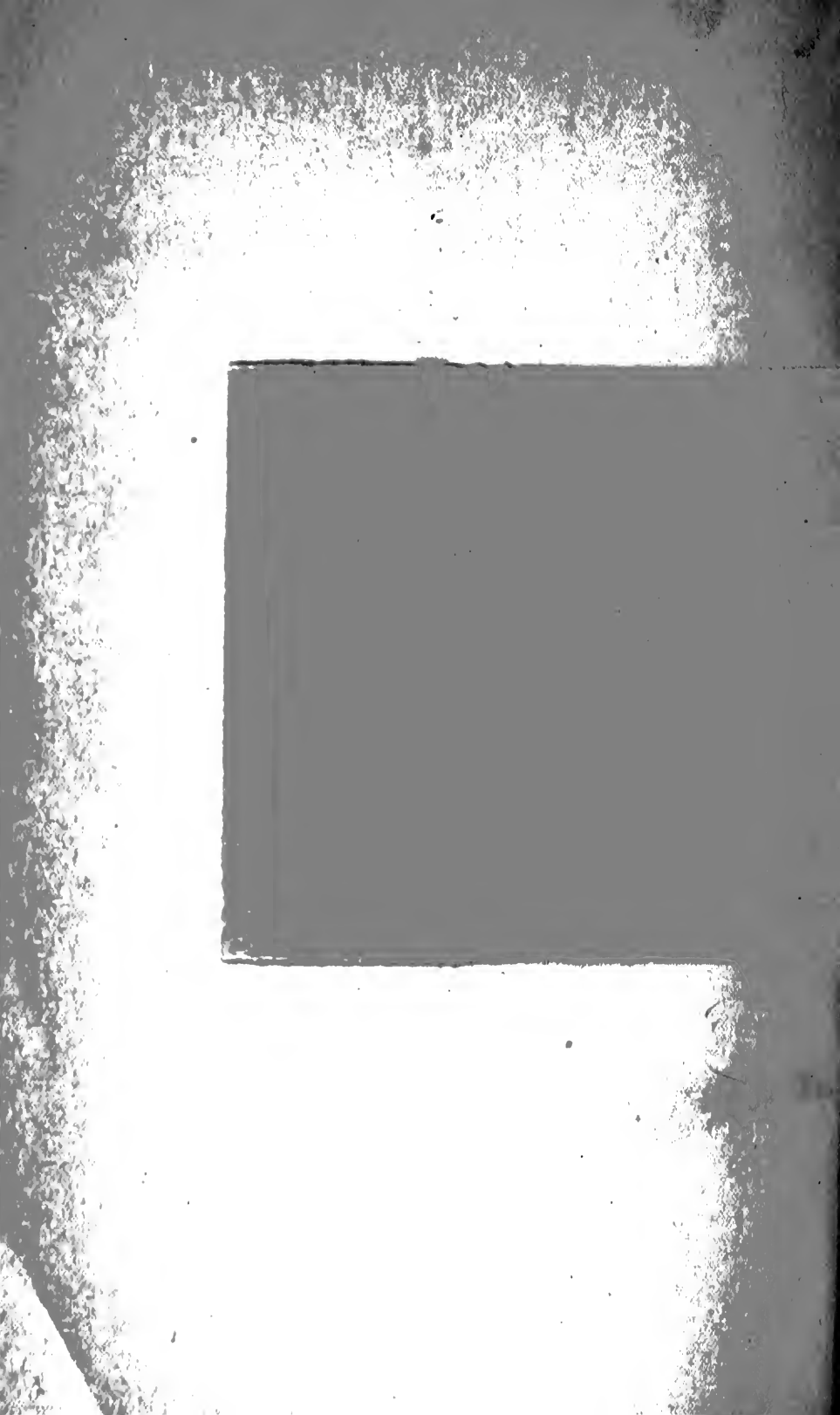
VOLUME I.

(Pages 1 to 224, Inclusive.)

Upon Appeal from the United States Circuit Court for the District of Idaho, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U. S. Circuit
Court of Appeals
6×7



No. 1913

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

(IN TWO VOLUMES.)

HARRY G. KING and MARIA J. KING, His Wife,
Appellants,

vs.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,
Appellees.

VOLUME I.

(Pages 1 to 224, Inclusive.)

Upon Appeal from the United States Circuit Court for the District of Idaho, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Index.

Index. Page

Index.

Index.

Index. Page

Index. Page

Index. **Page**

Index. Page

[Names and Addresses of Attorneys.]

Messrs. CLARK & BUDGE, Attorneys for Appellants, Pocatello, Idaho.

Messrs. RICHARDS & HAGA, Attorneys for Appellees, Boise, Idaho.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

IN EQUITY—No. 131.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Complaint.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Idaho, Southern Division.

Arthur H. Lamborn, a citizen of the State of New Jersey, residing at Montclair in said State, and John G. Richards, a citizen of the State of Texas, residing at Higgins, in said State, bring this their Bill of Complaint against Harry G. King and Maria J. King, his wife, citizens of the State of Idaho, residing at Salmon City in said State, and inhabitants of the Southern Division of the District of Idaho. And, therefore, your orators complain and say:

I.

That the said plaintiff, Arthur H. Lamborn, at all the times hereinafter mentioned has been and now is a resident of the City of Montclair in the State of New Jersey, and a citizen of the said State of New Jersey.

II.

That the said plaintiff, John G. Richards, at all the times hereinafter mentioned has been and now is a resident of the Town of Higgins in the State of Texas, and a citizen of the State of Texas.

III.

That the said defendants, Harry G. King and Maria J. King, at all the times hereinafter mentioned, have been and now are husband and wife, residing in Salmon City, Lemhi County, State of Idaho, and are citizens of the said State of Idaho.

IV.

That on or about the 30th day of July, 1908, the said plaintiffs entered into a contract in writing with the said defendants, wherein and whereby the said plaintiffs agreed to pay to the said defendants the sum of Seven Thousand Five Hundred Dollars ($7,500.00) in cash and the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00) on or before the 1st day of January, 1909, and to deliver to the said defendants four promissory notes of the plaintiff Arthur H. Lamborn on or before the 1st day of January, 1909, each of said notes to be for the sum of Two Thousand Five Hundred Dollars ($2,500.00), and falling due on the 1st day of January, 1910, the 1st day of January, 1911, the 1st day of January, 1912, and the 1st day of January, 1913, respectively; each

of said notes bearing interest at the rate of six per cent (6%) per annum, payable annually. In consideration of which the said defendants agreed to convey by warranty deed to the Idaho Coal and Land Company, Limited, a corporation to be incorporated by the parties to said agreement and as in said agreement provided, certain lands in Lemhi County, Idaho, particularly described as the SW. ¼ and the SE. ¼ of Section I, and the SE. ¼ of the SW. ¼ and the S. ½ of the SE. ¼ and the NE. ¼ of the SE. ¼ of Section 2, all in Township 21 North of Range 21 East of the Boise Meridian, together with the minerals and mineral veins therein contained, and all ditches and water rights and other improvements connected therewith, all of which will more fully appear by reference to said agreement, a copy of which is attached hereto marked Exhibit "A," and your orators pray that the same may be taken and considered as a part of this Bill of Complaint.

V.

Your orators show that during all the times herein mentioned the said defendant, Harry G. King, was a stockholder and director and president of the First National Bank of Salmon City, Idaho, and was believed and considered by your orators to be a man of high business standing and integrity, and your orators firmly believed that any and all representations and statements made by the said defendant Harry G. King were true and correct, and your orators, and each of them, accepted the statements of the said defendant in relation to said property and the conditions thereof and the amount of coal

which it had produced in the past, and particularly the statements hereinafter contained, as true and correct, and acted upon the same accordingly, and entered into the said agreement of July 30th, 1908, and made the payments hereinafter mentioned and executed the notes hereinafter described, and delivered the same to said defendant by reason of the faith and confidence reposed by your orators in the said defendant, and not otherwise.

Your orators further show that the said defendant Harry G. King for the purpose of inducing your orators, and each of them, to enter into the said contract and make the payments hereinafter mentioned and execute and deliver the notes hereinafter described, and for the purpose of cheating and defrauding your orators, and each of them, falsely and fraudulently stated and represented to your orators, and each of them, that the property above described was of great commercial value by reason of the coal deposits therein contained as shown by the development of such property by the said defendant and discovered therein and disclosed by the workings thereon, and that the investment to be made by your orators therein, pursuant to the terms of said contract, would result in great profit to your orators; that the said defendant stated and represented that the entire breast of what was known and designated as the "Old Room" in the workings and excavations on said property was clean coal and did not require any sorting, and was the same strata as the upper strata then exposed at the breast of the new entry, when in truth and in fact at the time of making the above-mentioned statements

and representations the said defendant Harry G. King knew the same, and each of them, to be false and untrue.

Your orators further show that at the time of such representations it was not possible for the plaintiffs or any one for them to examine or inspect the said excavations so known as the "Old Room" or the breast of such old workings, for the reason that the ground had so caved that access to such workings had been cut off, and by reason thereof it was impossible to see or inspect the same.

Your orators further show that for the purpose of confirming the above statements and inducing your orators, and each of them, to enter into said contract and make the said payments and deliver the said notes to the defendants, the defendant Harry G. King fraudulently and falsely states and represented to your orators, and each of them, that during the eleven months immediately preceding the making of such contract, Exhibit "A," that the said defendant Harry G. King, in developing such property and in extracting coal therefrom had mined twenty-three hundred (2300) tons of coal from such property, and had sold that amount of coal to consumers residing in and around the said town of Salmon City, and that had he (the said Harry G. King) not been prevented from soliciting orders personally by reason of his banking and other business, he could have mined therefrom and sold in said community three thousand (3,000) tons of coal during such time; and that with the assistance of the plaintiff John G. Richards during the coming year, if said agreement was entered into,

such tonnage and sales could be largely increased, and that the profits from such property would not be less than Nine Thousand Dollars ($9,000.00) for the first year; and that in addition to the above-mentioned tonnage so mined and sold from said premises during the time above stated, the said defendant Harry G. King falsely and fraudulently stated that he had mined and sold from such premises during the time above mentioned three hundred (300) tons of coal to the Copper Queen Mine, when in truth and in fact the said Harry G. King, at the time of making such statements and representations, knew the same to be false and untrue, and knew that the said defendant had not during the said time mined or extracted from the said premises or sold to consumers to exceed seven hundred (700) tons of coal, and that the defendant during such time had not mined from said premises for or sold to the said Copper Queen Mine to exceed twenty-five (25) tons of coal. And your orators were greatly deceived and injured by such false and untrue statements; and the said premises and property are practically of no value whatever.

VI.

Your orators further show that they, and each of them, reposed great confidence in the honesty and integrity of the said Harry G. King, and relied upon the said statements so made by the said defendant Harry G. King, and believed the same to be true, and accepted and acted upon the said statements, and each of them, as true, and by reason thereof, and not otherwise, entered into the said contract Exhibit "A"; that at the time of the execution of said contract your

orators paid to the said defendants the sum of Six Thousand Dollars ($6,000.00) in cash, and delivered to the said defendants two promissory notes, each for the sum of Seven Hundred and Fifty Dollars ($750.-00), and each executed by the plaintiff John G. Richards, and each due six months after date. The said notes and the said Six Thousand Dollars ($6,000.00) in cash being, by mutual agreement, accepted and received by the said defendants in lieu of the Seven Thousand Five Hundred Dollars ($7,500.00) to be paid at said time according to the terms of the said contract. And on or about the 1st day of January, 1909, your orators still believing the said statements and representations of the defendant Harry G. King to be true and correct, and by reason thereon, and not otherwise, paid to the said defendants the sum of Fifteen Thousand Dollars ($15,000.00) in cash, and delivered to the said defendants three promissory notes, each for the sum of Two Thousand Five Hundred Dollars ($2,500.00) and due six months after January 1st, 1909, and each executed by the plaintiff John G. Richards and bearing interest at the rate of six per cent (6%) per annum. The said cash and the said notes being, by mutual agreement between the parties, accepted and received by said defendants in lieu of the Twenty-two Thousand Five Hundred Dollars ($22,500.00) in cash to be paid by your orators on or before January 1st, 1909, according to the terms of said agreement; and your orators on or before January 1st, 1909, delivered to the said defendants four promissory notes, each for the sum of Two Thousand Five Hundred Dollars ($2,500.00), executed by the

plaintiff Arthur H. Lamborn, bearing interest at the rate of six per cent (6%) per annum, and falling due January 1st, 1910, January 1st, 1911, January 1st, 1912, and January 1st, 1913, respectively, as provided in the said agreement of July 30th, 1908. And your orators are informed and believe and so allege the fact to be, that the said defendants, or either of them, have not sold or transferred the said promissory notes, or any of them, and that the said defendants are now in possession of the same and all of them, but these plaintiffs are informed and believe, and so allege the fact to be, that the said defendants, unless restrained by an order of this Court, will sell, transfer and dispose of the said promissory notes, and each of them, to innocent parties.

VII.

Your orators further show that they, nor either of them, did not discover that the said statements of the said defendant Harry G. King, in relation to said property and hereinbefore mentioned or set forth, were false and untrue, until the latter part of January, 1909.

VIII.

Your orators further show unto your Honors that the corporation referred to in said Exhibit "A" annexed hereto, and to be organized by your orators and the said defendant Harry G. King, and to be known as "The Idaho Coal and Land Company, Limited," has not been organized or created, but the organization thereof has, by mutual consent, been deferred from time to time, and the land hereinbefore described and to be conveyed by said defend-

ants to such corporation has not been transferred or conveyed to such corporation, but is still owned and held by the said defendants.

IX.

Your orators further allege that by reason of the untrue, false and fraudulent statements of the said Harry G. King and the misrepresentations made by him in relation to the value of the said lands and coal properties and the condition thereof and the amount of coal mined therefrom, they have elected to rescind the said agreement of July 30th, 1908, and have elected not to purchase the said property and premises, and have demanded from the said defendants the repayment and return to your orators of the moneys paid by them as above set forth, to wit, the sum of Six Thousand Dollars ($6,000.00) paid July 30th, 1908, and the sum of Fifteen Thousand Dollars ($15,000.00) paid January 1st, 1909, and have demanded a return and redelivery to your orators of the notes above described, but the said defendants, and each of them, have declined and refused to repay and return said money or any part thereof, and have declined and refused to return the said notes or any of them.

X.

Your orators further allege and show that the matter in dispute in this suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2,000.00).

XI.

That the said defendants, and particularly the defendant Harry G. King, have in many other respects

deceived and misled your orators concerning the matters embraced in said contract, Exhibit "A"; and your orators were induced to make such payments and to execute and deliver such notes and to enter into said agreement (Exhibit "A") by the false and fraudulent statements and representations of said defendants; and your orators further show that they have no plain, speedy or adequate remedy at law.

All which actings, doings and pretenses of said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators in the premises. In consideration whereof and forasmuch as your orators are remediless in the premises, at and by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, and that the said defendants and each of them may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by your orators, they now pray the Court:

FIRST: That the said contract dated July 30th, 1908, (Exhibit "A"), be rescinded, set aside, annulled and held for naught, and that the plaintiffs be relieved and released of all their obligations thereunder, and that the defendants be required to surrender up the same to be cancelled, and that they be restrained and enjoined from setting up and claiming any rights thereunder.

SECOND: That the said defendants, and each of them, be restrained and enjoined from in any manner transferring or assigning or otherwise disposing

of the said promissory notes, or any of them, pending a final hearing and determination of this cause, and that upon the final determination of this cause, such promissory notes, and each of them, be set aside, *handled* and held for naught; and that the said defendants be required to surrender up such notes to be cancelled, and that they be restrained and enjoined from setting up or claiming any rights thereunder.

THIRD: That the defendants be required to return to the plaintiffs the said sum of Six Thousand Dollars ($6,000.00) with interest thereon from July 30th, 1908, and the said sum of Fifteen Thousand Dollars ($15,000.00), with interest thereon from January 1st, 1909, at the rate of seven per cent (7%) per annum; and that the plaintiffs have judgment against the said defendants, and each of them, for the said sums and interest.

FOURTH: That your orators may have such other and further relief in the premises as the nature of the circumstances of the case may require, and to your Honors shall seem meet.

FIFTH: That your orators may have and recover their costs in this behalf expended.

SIXTH: That your orators may have the benefit of a writ of attachment, attaching the property of the said defendants, and each of them, as security for the satisfaction of any judgment that may be recovered against said defendants by your orators.

SEVENTH: And may it please your Honors to grant your orators a writ of subpoena to be directed to the said Harry G. King and Maria J. King, thereby commanding them, and each of them, at a certain

time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there, full, true, direct and perfect answer make, but not under oath, the same being expressly waived, to all and singular the premises and the several allegations in your orators' Bill of Complaint, and further to stand to, perform and abide such further order, direction and decree therein as to this Honorable Court shall seem meet.

And your orators will ever pray.

RICHARDS & HAGA,
Solicitors and Counsel for Plaintiffs.
Residence, Boise, Idaho.

United States of America,
State of Idaho,
County of Ada,—ss.

John G. Richards, being first duly sworn, upon his oath says: That he is one of the plaintiffs named in the foregoing Bill of Complaint; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts are true of this deponent's own knowledge, and as far as they relate to the acts of others, he believes them to be true. That in regard to all matters and things in the foregoing bill alleged, which are not within the personal knowledge of this deponent and are therein alleged to be upon information or belief, your deponent has been fully informed, and he believes that the same are true.

JOHN G. RICHARDS.

Subscribed and sworn to before me, this 7th day of June, 1909.

[Seal] P. E. CAVANEY,
Notary Public.

Exhibit "A" [to Complaint].

THIS AGREEMENT made this 30th day of July, 1908, by and between Harry G. King and Maria J. King, his wife, of Salmon City, Lemhi County, Idaho, the parties of the first part, and Arthur H. Lamborn of Montclair, New Jersey, and John G. Richards, of Higgins, Lipscomb County, Texas, the parties of the second part:

WITNESSETH:

That for and in consideration of the mutual covenants and agreements hereinafter contained, as well as the payments of money hereinafter provided for, the said parties of the first part hereby agree to convey by warranty deed to "The Idaho Coal and Land Company, Limited," a corporation hereinafter described, to be organized, the following described lands situated in the County of Lemhi, State of Idaho, to-wit: the South-west quarter and the South-east quarter of Section One, and the South-east quarter of the South-west quarter, and the South half of the South-east quarter, and the North-east quarter of the South-east quarter of Section Two, all in Township 21 North of Range 21 East of the Boise Meridian, together with the minerals and mineral veins therein contained, and all ditches and water rights and other improvements connected therewith. The said deed shall convey the said property free and clear of all encumbrances and the said parties of the first part

will furnish with the said deed an abstract of the title to the said land, showing the same to be free and clear therefrom. The said deed shall be executed on or before the first day of January, 1909, and shall be placed in escrow with a depository hereafter to be agreed upon by the said parties, to be delivered to the said corporation upon compliance with the terms and conditions of this agreement.

In consideration whereof the said parties of the second part agree to pay to the said Harry G. King the sum of seven thousand five hundred dollars ($7,500) cash in hand, the receipt whereof is hereby acknowledged, and the further sum of twenty-two thousand five hundred dollars ($22,500) payable on or before the first day of January, 1909; the said Arthur H. Lamborn will also, on or before the first day of January, 1909, execute and deliver to the said Harry G. King his four promissory notes for the sum of twenty-five hundred dollars ($2,500) each, or ten thousand dollars ($10,000) in all payable the first note on the first day of January, 1910, the second on the first day of January, 1911, the third on the first day of January, 1912, and the fourth and last on the first day of January, 1913. It is also understood and agreed that the said parties hereto, who shall organize and control the said corporation, will cause, as hereinafter provided, the bonds of the said corporation, secured by first mortgage upon the said property, to be executed and delivered to the said Harry G. King, in the further sum of forty thousand dollars ($40,000) making the total amount of money, notes and bonds to be paid for the said property, to

be equal to eighty thousand dollars ($80,000). The said notes of Arthur H. Lamborn shall bear interest at the rate of six per cent per annum, payable annually.

The said Harry G. King and the said parties of the second part hereby mutually agree that they will complete the organization of the said corporation as soon as practicable, and not later than the first day of January, 1909. The said corporation shall be organized for the sum of two hundred thousand dollars ($200,000) divided into two thousand shares of the par value of one hundred dollars each; that the said stock shall be subscribed for by the said parties as follows: The said Harry G. King, five hundred shares; the said John G. Richards, five hundred shares, and the said Arthur H. Lamborn, one thousand shares, and upon the completion of the organization of the said corporation, the said corporation shall, in part payment for the transfer to it of the said property, execute to the said parties its bonds, secured by first mortgage upon the said property, in the sum of eighty thousand dollars ($80,000) which shall be issued to the said Harry G. King as aforesaid, in the sum of forty thousand dollars ($40,000) to the said John G. Richards in the sum of seven thousand five hundred dollars ($7,500) and to the said Arthur H. Lamborn in the sum of thirty-two thousand and five hundred dollars ($32,500) the said bonds to draw interest at the rate of six per cent per annum, payable semi-annually, and to run for the term of twenty years.

The said Harry G. King agrees to attend person-

ally to the details of the completion of the organization of the said corporation, which shall be completed as aforesaid, on or before the first day of January, 1909, and in case the said parties of the second part shall fail to pay to the said Harry G. King, on or before the first day of January, 1909, the said sum of twenty-two thousand five hundred dollars ($22,500) then this agreement shall become null and void, and the said sum of seven thousand five hundred dollars ($7,500) paid at the date hereof, shall become forfeited to the said parties of the first part.

It is mutually understood and agreed by the parties hereto that this agreement shall run to and bind the heirs, executors and administrators of each and every of the said parties; and it is further mutually understood and agreed that in case of the death of either of the said parties of the second part, if the survivor shall be unable, in a financial way, to carry out and complete this agreement on behalf of such deceased party, such survivor shall be permitted to carry out and complete the terms hereof for his proportionate interest in the said property as fixed and determined by the terms and conditions of this agreement.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, this 30th day of July, 1908.

(Signed) HARRY G. KING, [L. S.]
MARIA J. KING, [L. S.]
ARTHUR H. LAMBORN, [L. S.]
J. G. RICHARDS, [L. S.]

[Endorsed]: Filed June 8th, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the Southern Division of the District of Idaho.

IN EQUITY—No. 131.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Subpoena ad Respondendum.

The President of the United States of America, To Harry G. King and Maria J. King, his Wife, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in Pocatello, in said District, on the first Monday of July next, which will be the fifth day of July, A. D. 1909, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said court, wherein Arthur H. Lamborn and John G. Richards are complainants and you are defendants, and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or your Deputy, to make due service of this

our Writ of Subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of our said Circuit Court affixed at Boise, in said District, this 8th day of June, in the year of our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States the One Hundred and Thirty-second.

[Seal] A. L. RICHARDSON,
Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso.*

I hereby certify that I received the within subpoena ad respondendum, together with a certified copy of the complaint, and certified copy of restraining order at Boise, Idaho, on June 8th, 1909, and that I served the same upon Harry G. King at Salmon City, Lemhi County, Idaho, on June 11, 1909, and upon Maria J. King, the wife of Harry G. King, at Salmon City, Lemhi County, Idaho, on June 12, 1909, by handing to and leaving with the said Harry G. King, and Maria J. King, the wife of the said Harry G. King, each personally, a duplicate of the within subpoena ad respondendum, together with a

certified copy of the complaint and a certified copy of the restraining order.

S. L. HODGIN,
U. S. Marshal.
By E. W. Beemer,
Deputy.

Boise, Idaho, June 16, 1909.

[Endorsed]: No. 131. In the Circuit Court of the United States for the Southern Division of the District of Idaho. In Equity. Arthur H. Lamborn and John G. Richards vs. Harry G. King and Maria J. King, his Wife. Subpoena ad Respondendum. Returned and filed June 17, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

IN EQUITY—No. 131.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Affidavit [of John G. Richards].

State of Idaho,
County of Ada,—ss.

John G. Richards, being first duly sworn, upon his oath, deposes and says: That he is one of the plain-

tiffs in the above-entitled action and knows the defendants Harry G. King and Maria J. King; that the said defendants have received from the said plaintiffs negotiable promissory notes to the amount of Nineteen Thousand Dollars ($19,000.00), as will more fully appear from the Bill of Complaint on file herein; that of the said notes seven of them, aggregating Seventeen Thousand Five Hundred Dollars ($17,500.00) are not yet due or payable; that this deponent believes that the said defendants, when advised of the commencement of this action, will transfer the said notes to innocent parties for the purpose of still further injuring and defrauding the plaintiffs in said action; that the said defendants are unable to respond in damages for the injuries that said plaintiffs would sustain by the transfer of said notes to innocent parties, and that the said plaintiffs cannot be protected against great financial loss or in their rights, unless the said defendants, and each of them, are restrained and enjoined from disposing of the said notes, and each of them, until the final determination of this action.

JOHN G. RICHARDS.

Subscribed and sworn to before me, this 8th day of June, 1909.

[Seal] P. E. CAVANEY,
Notary Public.

[Endorsed]: Filed June 8th, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

IN EQUITY—No. 131.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Motion [Filed June 8, 1909, for Preliminary Injunction].

Now come the plaintiffs in the above-entitled suit, by Richards & Haga, their counsel, and move this Honorable Court to grant a preliminary Injunction against the said defendants, and each of them, their agents and attorneys, pending this suit and until the further order of the Court, conformable to the prayer of the Bill in said cause filed.

RICHARDS & HAGA,
Solicitors and Counsel for Plaintiffs,
Residence, Boise, Idaho.

[Endorsed]: Filed June 8, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

IN EQUITY—No. 131.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Restraining Order.

WHEREAS, in the above-named cause it has been made to appear upon the Bill of Complaint filed herein and the exhibits annexed thereto and the affidavit of John G. Richards, that a Writ of Injunction preliminary to the final hearing is proper, and that *prima facie* the plaintiffs are entitled thereto, enjoining the defendants herein from transferring the notes described in said Bill of Complaint. Now, on motion of the said plaintiffs, it is ordered that the defendants appear before the Circuit Court of the United States for the District of Idaho at the courtroom of said Court at Boise, upon the 21st day of June, 1909, at ten o'clock A. M. of said day, and then and there show cause, if any they have, why the preliminary injunction therein prayed for should not issue, and it appearing to the undersigned District Judge for said District that there is danger of irreparable injury being caused to the plaintiffs before

the hearing of said application for a preliminary Writ of Injunction can be heard, unless the defendants are, pending such hearing, restrained as hereinafter set forth:

THEREFORE, plaintiffs' application for such Restraining Order is granted upon they giving a bond with good and sufficient sureties, to be approved by the Clerk of this Court, in the penal sum of One Thousand Dollars ($1,000.00), securing the said defendants against all loss or damages which may result from the issue of said order, if it should be finally determined that the same was improperly issued, or that may be awarded to them by reason of the granting of said order.

NOW, THEREFORE, it is ordered that you, the said Harry G. King and Maria J. King, defendants herein, your agents and attorneys and all persons and corporations acting by or under your authority or direction, be, and you are hereby, specially restrained and enjoined from selling, assigning, transferring or otherwise disposing of or placing out of your possession or beyond your control, the promissory notes given you, or either of you, by the said plaintiffs, or either of them, particularly those certain notes executed by the plaintiff Arthur H. Lamborn, four in number, each for Two Thousand Five Hundred Dollars ($2,500.00), and falling due on the 1st day of January, 1910, the 1st day of January, 1911, the first day of January, 1912, and the 1st day of January, 1913, respectively, and all bearing interest at the rate of six per cent (6%) per annum, payable annually. Also those certain promissory notes,

two in number, executed by the plaintiff John G. Richards on or about the 30th day of July, 1908, each for Seven Hundred and Fifty Dollars ($750.00), with interest at the rate of six per cent (6%) per annum; also those certain promissory notes, three in number, each for Two Thousand Five Hundred Dollars ($2,500.00), executed by the plaintiff John G. Richards on or about the 1st day of January, 1909, and due six months after date and bearing interest at the rate of six per cent (6%) per annum, and any and all other notes received by you, or either of you, from either of the above-named plaintiffs, in part payment or as part of the purchase price for a certain coal mine and real estate in Lemhi County, Idaho, pursuant to a contract between you and the said plaintiffs dated July 30th, 1908, or any amendatory or supplemental agreement in relation to said property, until otherwise ordered by the Court.

It is further ordered that a copy of this order, certified under the hand of the Clerk and the seal of this Court, be served on each of the defendants.

Dated at Boise, Idaho, this 8th day of June, 1909.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed June 8th, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Bond on Restraining Order.

Know All Men by These Presents, That we, John G. Richards, as principal, and the United States Fidelity & Guaranty Company, a corporation, as surety, parties of the first part, are held and firmly bound unto the said Harry G. King and Maria J. King, defendants in the above-entitled suit, parties of the second part, in the just and full sum of One Thousand Dollars ($1,000.00), for the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, and each of our successors, heirs, executors and administrators, firmly by these presents.

SEALED with our seals and dated this 8th day of June in the year of our Lord One Thousand Nine Hundred Nine, upon conditions as follows:

WHEREAS, Arthur H. Lamborn and the said John G. Richards have commenced a certain suit against the above-named parties defendant in the

Circuit Court of the United States in and for the District of Idaho, Southern Division, and therein prayed for an injunction against the said defendants, pending the trial of said suit, and also prayed for a restraining order therein upon said defendants, preliminary to the hearing of said application for injunction; and,

WHEREAS, the Honorable Frank S. Dietrich, District Judge for said District, has granted said prayer for said restraining order upon condition that the said parties shall cause to be executed a good and sufficient bond to the defendants for the sum of One Thousand Dollars ($1,000.00), to secure them against all costs and damages which may be awarded to them in case said order shall be finally determined to have been improperly granted:

NOW, THEREFORE, if the said Arthur H. Lamborn and John G. Richards shall well and truly pay the said defendants all costs and damages which may be awarded to them in case said Court shall finally determine that said order was improperly granted, not exceeding the said sum of One Thousand Dollars ($1,000.00), then this application to be null and void; otherwise, to be and remain in full force and effect.

IN WITNESS WHEREOF, the said principal has hereunto set his hand and seal, and the said surety has hereunto caused its name to be subscribed

by its duly authorized agent and attorney in fact, this 8th day of June, 1909.

J. G. RICHARDS.

M. SORENSON.
M. L. TUCKER.

THE UNITED STATES FIDELITY & GUARANTY COMPANY. [Seal]
By I. P. MARCELLUS,
Its Attorney in Fact.
MORRISON & PENCE,
Its Attorneys in Fact.

[Endorsed]: Approved and Filed June 8, 1910. A. L. Richardson, Clerk.

In the United States Circuit Court, District of Idaho, Southern Division.

ARTHUR H. LAMBORN, and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING, and MARIA J. KING, His Wife,

Defendants.

Demurrer.

THE JOINT AND SEVERAL DEMURRER OF HARRY G. KING AND MARIA J. KING, HIS WIFE, TO THE BILL OF COMPLAINT OF ARTHUR H. LAMBORN AND JOHN J. RICHARDS, COMPLAINANTS.

Said defendants by protestation, not confessing, nor acknowledging all or any of the matters and

things in said Bill of Complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said bill, and for cause of demurrer show: That the complainants have not in and by their said bill made or stated such a cause as entitles them in a court of equity to any relief from or against these defendants, or either of them, touching the matters contained in the said bill, or any of such matters.

Wherefore said defendants demur to said bill and to all matters and things therein contained, and pray the judgment of this Honorable Court whether they shall be compelled to make any further or other answer thereto, and pray to be dismissed with their reasonable costs in this behalf sustained.

CLARK & BUDGE,
Solicitors for Defendants.

I, Jesse R. S. Budge, one of the solicitors for the defendants above named, do hereby certify that in my belief the foregoing demurrer of Harry G. King and Maria J. King, his wife, defendants to the Bill of Complaint of Arthur H. Lamborn and John G. Richards, is well founded in point of law and proper to be filed in the above cause.

JESSE R. S. BUDGE.

United States of America,
State of Idaho,
County of Lemhi,—ss.

Harry G. King and Maria J. King, his wife, defendants above-named, being severally duly sworn each for himself and herself respectively says: The said Harry G. King that he has read, and the said

Maria J. King that she has read the foregoing demurrer to the Bill of Complaint of Arthur H. Lamborn and John G. Richards in this suit, and that the same is not interposed for the purpose of delaying the said suit, or other proceedings therein.

HARRY G. KING.
MARIA J. KING.

Subscribed and sworn to before me this 24th day of June, 1909.

[Seal] FRANK L. PLUMMER,
Notary Public Lemhi County, Idaho.

[Endorsed]: Filed June 30, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Motion [Filed July 27, 1909, for Preliminary Injunction].

Comes now the plaintiffs in the above-entitled suit, by Richards & Haga, their counsel, and show to the Court that the defendants having failed to appear and show cause herein why the preliminary injunc-

tion prayed for in the Bill of Complaint, should not issue in compliance with the order of this Court, and moves this Honorable Court to grant the preliminary injunction against said defendants, and each of them, their agents and attorneys, pending this suit and until the final order of the Court conformable to the prayer of the *Complaint* in said Bill of Complaint filed.

RICHARDS & HAGA,
Solicitors and Counsel for Plaintiffs,
Residence, Boise, Idaho.

[Endorsed]: Filed July 27, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Answer.

THE JOINT AND SEVERAL ANSWERS OF HARRY G. KING AND MARIA J. KING, THE DEFENDANTS, TO THE BILL OF COMPLAINT OF ARTHUR H. LAMBORN AND JOHN G. RICHARDS, COMPLAINANTS.

These defendants respectively now and at all times hereafter saving to themselves all and all manner of benefit of exceptions or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answer and say:

I.

That as to whether or not the complainant, Arthur H. Lamborn at all the times in said Bill of Complaint mentioned, has been or now is a resident of the city of Montclair in the State of New Jersey, and a citizen of said State of New Jersey, this defendant has not sufficient information on which to base a belief, and therefore denies the same.

II.

That as to whether or not the complainant, John G. Richards at all the times in said Bill of Complaint mentioned, has been or now is a resident of the town of Higgins in the State of Texas, and a citizen of said State of Texas, this defendant has not sufficient information on which to base a belief, and therefore denies the same.

III.

Answering paragraph five of said Bill of Complaint defendants admit that at all the times in said bill mentioned defendant Harry G. King was a stockholder and director and President of the First National Bank of Salmon City, Idaho, but defendants allege that as to whether or not complainants believed or considered said defendant to be a man of high business standing and integrity, or as to whether or not complainants firmly or otherwise, or at all believed that all or any representations or statements made by said defendant Harry G. King were true or correct as touching the matters and things set forth and contained in said Bill of Complaint, or any of such matters and things, or as to whether or not said complainants, or either of them accepted the statements of said defendant in relation to the property described and referred to in said Bill of Complaint, or as to the condition thereof, or as to the amount of coal which it had produced in the past, these defendants have not sufficient information upon which to base a belief, and therefore deny the same. Defendants deny that said complainants accepted the alleged statements of defendants as true or correct; or that said alleged statements were ever made by said defendant. Defendants deny that complainants acted upon said alleged statements accordingly or otherwise, or entered into the said agreement of July 30, 1908, or made the payments in said Bill of Complaint mentioned, or executed the notes in said Bill of Complaint described, or delivered said notes to defendants, or that any of said alleged acts of complain-

ants, or either of them were done or performed by reason of the faith or confidence reposed by said complainants in said defendants, and not otherwise, but defendants allege the facts to be as hereinafter set forth.

And defendants deny that said defendant Harry G. King for the purpose of inducing complainants, or either of them to enter into said contract, or to make the payments in said Bill of Complaint mentioned, or to execute or deliver the said notes in said Bill of Complaint described, or for the purpose of cheating or defrauding complainants, or either of them, or for any other purpose or object, falsely or fraudulently, or otherwise or at all stated or represented to complainants, or either of them, that the property described in said Bill of Complaint was of great commercial value by reason of the coal deposits therein contained as shown by the development of such property by said defendant, and discovered therein and disclosed by the workings thereon; or that the investment to be made by complainants therein pursuant to the terms of said contract, would result in great or any profit to complainants. Defendants deny that said defendant Harry G. King ever stated or represented in the manner and form or for the purposes, or with the object set forth in said Bill of Complaint, or otherwise or at all that the entire breast of what was known and designated as the "Old Room" in the workings and excavations on said property, was clean coal and did not require any sorting. Defendants deny that in manner and form as in said Bill of Complaint alleged, or otherwise or at all, or for

the purposes, or with the object stated in said bill, or for any other purpose or object said defendant Harry G. King stated or represented that the entire breast of what was known and designated as the "Old Room" was the same strata as the upper strata then exposed at the breast of the new entry. Defendants deny that any of said alleged statements were made by said defendants, or either of them, in manner and form, and with the object, and for the purposes as in said Bill of Complaint alleged or otherwise or at all, or that said alleged statements or representations were made with the knowledge on the part of the said defendant Harry G. King, at the time, that each or either of said alleged statements, or representations were false or untrue.

Defendants deny that at the time of said alleged representations it was not possible for the complainants or either of them or any one for them, to examine or inspect said excavations, so known as the "Old Room" or the breast of such old workings, for the reason that the ground had so caved that access to such workings had been cut off, or that by reason thereof it was impossible to see or inspect the same. Defendants allege the facts in that regard to be, that at or about the time the said contract was entered into between complainants and defendants, a portion of the said old workings near what was known as the "Old Room" was inaccessible, but defendants allege that said old workings had immediately before, and during a period of several months immediately prior to the execution of said contract been repeatedly examined and inspected by said complainants,

and on their behalf, and that as to the quality and quantity of coal in said old workings, or in said old room at the time of the execution of said contract, complainants were fully informed and advised from said examinations and inspections, and from repeated inquiries made of the superintendent of said mine, and of the miners then at work therein, and complainants did not rely upon said alleged or any statements of said defendant as to said "Old Room" or the workings therein as an inducement to the execution of said contract, or for the payment of any moneys or the delivery of any notes, or for the performance of any of the acts on the part of said complainants as in said bill of complaint alleged.

Defendants deny that for the purpose of confirming said alleged statements, or for the purpose of inducing complainants, or either of them to enter into said contract, or to make the said payments or to deliver the said notes to defendants, or for any other purpose, said Harry G. King fraudulently or falsely, or otherwise or at all stated or represented to complainants, or either of them that during the eleven (11) months immediately preceding the making of such contract Exhibit "A," that said defendant Harry G. King in developing such property, and in extracting coal therefrom, had mined twenty-three hundred (2,300) tons of coal from such property, or that he had sold that amount of coal to consumers residing in and around the said town of Salmon City. Deny that said defendants falsely or fraudulently, or otherwise or at all, for the purposes aforesaid, or for any purpose, stated that had he, the said defendant

Harry G. King, not been prevented from soliciting orders personally by reason of his banking and other business, he could have mined from said property, and sold in said community, three thousand (3,000) tons of coal during such time, or that with the assistance of the complainant John G. Richards during the coming year, if said agreement was entered into, such tonnage and sales could be largely increased, or that the profits from such property would not be less than Nine Thousand ($9,000.00) Dollars for the first year. Defendants deny that said defendant Harry G. King falsely or fraudulently or otherwise stated, or that he ever stated, that in addition to the above mentioned tonnage he had mined and sold from such premises during the time above mentioned, three hundred (300) tons of coal to the Copper Queen Mine. Defendants deny that said defendant ever made any such statements or representations, or that he ever made any such statements or representations knowing the same to be false, or untrue when made, or that said defendant knew that he had not during said time mined or extracted from said premises, or sold to consumers to exceed seven hundred (700) tons of coal, or that defendant during such time had not mined from said premises for or sold to the said Copper Queen Mine to exceed twenty-five (25) tons of coal. Defendants deny that complainants were greatly or otherwise, deceived, or injured by said alleged or any false or untrue statements on the part of said defendant, or that said defendant ever made any false or fraudulent statements in manner and form, and for the purposes in said complaint alleged

or otherwise or at all. Defendants deny that said premises and property are practically of no value whatever, but allege the facts to be in that regard that said property is of great value, to wit, of a value in excess of Fifty Thousand ($50,000.00) Dollars.

IV.

Defendants allege that as to whether or not the complainants, or either of them reposed great or any confidence in the honesty or integrity of said defendant Harry G. King, they have not, nor has either of them sufficient information on which to base a belief, and therefore deny the same. Defendants deny that complainants, or either of them, relied upon the statements alleged in said Bill of Complaint to have been made by said defendant Harry G. King, or that said complainants or either of them believed the same to be true, or that they accepted or acted upon said statements, or each or either of them as true, or that by reason thereof, and not otherwise complainants entered into said contract, Exhibit "A."

Defendants admit that at the time of the execution of said contract complainants paid to the defendants the sum of Six Thousand ($6,000.00) Dollars in cash, and delivered to said defendants two promissory notes each for the sum of Seven Hundred Fifty ($750.00) Dollars, and each executed by the complainant John G. Richards, and each due six months after date; and admit that said notes, and said Six Thousand ($6,000.00) Dollars in cash were by mutual agreement accepted and received by said defendants in lieu of the Seven Thousand Five Hundred ($7,500.00) Dollars to be paid at said time according to

the terms of said contract. Defendants admit that on or about the first day of January, 1909, complainants paid to defendants the sum of Fifteen Thousand ($15,000.00) Dollars in cash, and delivered to defendants three (3) promissory notes each for the sum of Twenty-five Hundred ($2,500.00) Dollars, and due six months after January 1, 1909, and each executed by the complainant John G. Richards, and bearing interest at the rate of six per cent per annum. Defendants admit that the said cash so paid as aforesaid and said notes so made and delivered, were by mutual agreement accepted and received by defendants in lieu of the Twenty-two Thousand Five Hundred ($22,500.00) Dollars in cash to be paid by complainants on or before January 1, 1909, according to the terms of said agreement, and admit that complainants on or before January 1, 1909, delivered to defendants four (4) promissory notes each for the sum of Twenty-five Hundred ($2,500.00) Dollars executed by the complainant Arthur H. Lamborn, bearing interest at the rate of six per cent per annum and falling due January 1st, 1910; January 1, 1911; January 1, 1912 and January 1, 1913, respectively as provided in the said agreement of July 30th, 1908, but defendants deny that said money was paid on said notes executed or delivered by reason of the alleged statements or representations of defendant Harry G. King, or solely by reason of the fact that complainants believed said alleged representations or statements to be true, or correct. Defendants allege the facts to be that all of said acts so done and performed by complainants pursuant to said contract were not,

nor was any or either of them, induced by any false or fraudulent statement whatsoever by defendants, or either of them, but that said acts were done and performed after full examination and inspection of, and information concerning the said property in said Bill of Complaint described, and after the said complainants and each of them had been and were fully advised in the premises.

Defendants deny that they have not sold or transferred the said promissory notes or any of them, and that defendants are now in possession of said notes, but allege the facts to be in that regard that long prior to the bringing of this suit, to wit: February 1, 1909, said defendants sold and disposed of the said note for Twenty-five Hundred ($2,500.00) Dollars executed by complainant Arthur H. Lamborn, dated December 31, 1908, payable December 31, 1909, and on the 11th day of December, 1908, defendants sold and transferred the said two notes for Seven Hundred Fifty ($750.00) Dollars each, executed by complainant John G. Richards dated August 1, 1908, and payable January 1, 1909; that all of said notes were transferred for a valuable consideration.

V.

Answering paragraph seven of said Bill of Complaint, defendants again aver that the said defendant Harry G. King did not make any of the statements alleged in said Bill of Complaint to have been made by him, in manner and form as in said Bill of Complaint set forth or otherwise, in relation to said property described in said bill, and therefore deny that complainants in the latter part of January, 1909, dis-

covered the falsity or untruth of said alleged statements, or any statements of defendants in relation to said property.

VI.

Defendants deny that the corporation referred to in said Exhibit "A" annexed to said Bill of Complaint, which was to be organized by complainants and defendant Harry G. King, and to be known as the Idaho Coal & Land Company, Limited, has not been organized or created. Admit that the organization of said corporation by mutual consent was deferred from time to time after the first day of January, 1909, but allege the fact to be that said corporation was duly incorporated as provided in said agreement, and a certificate of incorporation duly issued on the 5th day of February, 1909, by the Secretary of State of the State of Idaho. Admit that the land and premises described in said Bill of Complaint has not been conveyed by defendants to said corporation, and allege the facts to be that by the terms of said agreement the deed for said property was to be executed on or before the first day of January, 1909, and placed in escrow with the depository thereafter to be agreed upon by the said parties, and to be delivered to the said corporation upon the compliance with the terms and conditions of said agreement, and that said deed has been so signed and acknowledged and was by defendants duly placed in escrow with the First National Bank of Salmon City, the depository agreed upon by the parties.

Defendants allege that the said complainant Arthur H. Lamborn is the President and the said

complainant John G. Richards the Manager and managing agent of said corporation, and that said complainants have not, nor has either of them ever made request for said deed on behalf of said corporation, and furthermore defendants allege that said complainants as President and Manager respectively of said corporation in the management and control thereof have steadfastly neglected and refused to proceed in any manner to further carry out the terms and conditions of said agreement Exhibit "A" in order to provide for the payment of the balance of the consideration in said agreement mentioned, for which said property was to be by said defendants transferred to said corporation. Nor have said complainants paid certain of the promissory notes given by them as aforesaid, and which have long since matured, but on the contrary said complainants have neglected and refused and still neglect and refuse to pay the same, and the said complainants have defaulted in said particulars mentioned notwithstanding defendants have performed and discharged all obligations, covenants and promises to be by them kept and performed under the said agreement.

VII.

Defendants deny that by reason of the said alleged or any untrue or false or fraudulent statements of the said defendant Harry G. King, or the said alleged or any misrepresentations made by him in relation to the value of the said lands and coal properties or the condition thereof, or the amount of coal mined therefrom, complainants have elected to rescind the said agreement of July 30, 1908, or have

elected not to purchase the said property and premises, or have demanded from said defendants the repayment and return to complainants of the moneys paid by complainants as in said Bill of Complaint alleged, or have demanded a return and redelivery to complainants of the notes described in said Bill of Complaint. Deny that said alleged or any untrue or false or fraudulent statements or representations were made by said defendants in relation to said properties as in said Bill of Complaint alleged, or otherwise or at all, and defendants allege the facts to be upon information and belief, that the election of said complainants to rescind the said agreement was made for the purpose, and with the object of avoiding the obligations of the complainants by them entered into with defendants, and to defeat the just claims of defendants upon complainants for the payment of the consideration due defendants under the said contract of July 30, 1908.

Defendants deny that complainants have demanded the return and delivery of the notes described in said Bill of Complaint, or the return or repayment of the said moneys paid to defendants by complainants as aforesaid. Defendants admit that they decline and refuse to return said money, or any part thereof, or to return the said notes or any of them.

VIII.

Admit that the matter in dispute in this suit exceeds (exclusive of interest and costs) the sum of value of Two Thousand ($2,000.00) Dollars.

IX.

Deny that defendants have, or either of them, has, in many or any other respects, or at all, deceived or misled complainants concerning the matters, or any of the matters embraced in said contract Exhibit "A," or any matters whatsoever, and deny that complainants were induced to make such or any of such payments, or to execute or deliver said or any of said notes, or to enter into said agreement Exhibit "A" by said alleged or any false or fraudulent statements or representations of the said defendants, or either of them. Deny that complainants have no plain, speedy or adequate remedy at law.

And defendants deny that they have, or either of them has in any manner acted to the wrong, injury or oppression of the complainants, or either of them in the premises, and deny that complainants have any right to further answer to the Bill of Complaint herein, and deny that the complainant has any right to an injunction, account, damages or any other relief whatever, without this, that any other material cause or things in said complainants' bill contained, material or necessary to make answer unto, and not hereby well and sufficiently answered, confessed, traversed and avoided or denied is true, to the knowledge or belief of the defendants, submit for the reasons hereinbefore recited and set forth that the complainants are not entitled to any relief whatsoever against the defendants. All of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly pray to be hence dismissed

with their reasonable costs and charges in this behalf most wrongfully sustained.

CLARK & BUDGE,
Solicitors for Defendants.

United States of America,
State of Idaho,
County of Lemhi,—ss.

Harry G. King and Maria J. King, his wife, being first severally duly sworn each for himself deposes and says: That he is one of the defendants named in the foregoing answer, that he has read said answer, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be on information or belief, and as to those matters he believes it to be true.

HARRY G. KING.
MARIA J. KING.

Subscribed and sworn to before me this 12th day of July, 1909.

[Seal] P. J. DEMPSEY,
Notary Public.

[Endorsed]: Filed July 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Order [Continuing Restraining Order].

WHEREAS, in the above-named cause it was made to appear upon the Bill of Complaint filed herein and the exhibits annexed thereto and the affidavit of John G. Richards, that a preliminary Writ of Injunction enjoining the defendants herein from transferring the notes described in said Bill of Complaint was proper; and,

WHEREAS, a restraining order was issued and said defendants were ordered to appear before the Circuit Court of the United States of the District of Idaho at the courtroom of said court at Boise, upon the 21st day of June, 1909, at ten o'clock A. M. of said day and then and there show cause, if any they had, why the preliminary injunction therein prayed for should *not issued,* and it was further ordered that a copy of such order, certified under the hand of the Clerk and the seal of this Court be served upon each of said defendants; and,

WHEREAS, it appearing that the said copy was so served upon the said defendants, and that said defendants failed to appear in obedience thereto;

NOW, THEREFORE, it is ordered that such restraining order be continued against said defendants, Harry G. King, and Maria J. King, as a temporary injunction, pending the trial of the cause or until otherwise ordered by the Court or Judge.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Aug. 16, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Replication.

These replicants, Arthur H. Lamborn and John G. Richards, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, Harry G. King and Maria J. King, for replication thereto, saith:

That they do and will ever maintain and prove their

said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants, Harry G. King and Maria J. King, is very uncertain, evasive and insufficient to be replied unto by this replication; without that, that any other matter or thing in said answer contained, material or effectual, in the law to be replied unto and in herein and hereby, and sufficiently replied unto confessed or avoided, traversed or denied, is true; all of which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly, as in and by their said bill they have already prayed.

RICHARDS & HAGA,
Solicitors for Complainants,
Residence, Boise, Idaho.

Service of the foregoing acknowledged by receipt of copy this 25th day of August, 1909.

CLARK & BUDGE,
Solicitors for Defendants.

[Endorsed]: Filed Sept. 7, 1909. A. L. Richardson, Clerk.

[Letter, Dated October 21, 1909, from Messrs. Clark & Budge to Richards & Haga.]

Pocatello, Idaho, Oct. 21, 1909.

Messrs. Richards & Haga,
Boise, Idaho.

Gentlemen: In the case of Lamborn & Richards vs. King, if it is your desire to take the testimony the fore part of December as suggested in our letter to you of August 30th, it would be well to have the Judge

appoint the special examiner. We have been informed that Judge Dietrich intends to leave Boise on the 23rd and that he will not likely return for several weeks, and you may conclude that it would be well to have the appointment made before he goes. We simply suggest this for your consideration.

As to the person to be appointed, we think that Mr. Daniel Hamer, Judge Budge's stenographer, would be a fit person as he is one of the very best men we know in taking testimony.

We can agree upon the exact date for the hearing some time in the future.

Yours truly,

CLARK & BUDGE.

[Letter, Dated October 29, 1909, from Messrs. Richards & Haga to Hon. F. S. Dietrich.]

October 29, 1909.

Hon. F. S. Dietrich,
Moscow, Idaho.

Dear Sir: Enclosed you will please find Stipulation and form of Order in the case of Lamborn vs. King.

If agreeable to you, both sides would be pleased to have Daniel Hamer appointed as examiner to take this testimony, as will appear from the enclosed letter from Clark & Budge, which you will kindly return to us. Mr. Hamer is stenographer for Judge Budge and will be at liberty on the date mentioned in the Stipulation.

Very truly yours,

RICHARDS & HAGA.

In the Circuit Court of the United States, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Stipulation [Re Testimony].

In this cause it is hereby stipulated between the respective parties, by their solicitors, that the testimony therein shall be taken orally, and that it shall be taken down stenographically and then transcribed in longhand and the signatures of the witnesses to such transcribed testimony are waived. The testimony shall be taken before ————, special examiner, to be appointed by the Court. The taking of testimony shall be taken at Pocatello, Idaho, beginning on the 14th day of December, 1909, at ten o'clock A. M., and shall continue from time to time as suits the convenience of parties; except that the testimony of Robert Forester shall be taken on the 8th day of November, 1909, commencing at ten o'clock A. M. on such day.

RICHARDS & HAGA,
Attorneys for Complainants,
Residence, Boise, Idaho.

CLARK & BUDGE,
Attorneys for Defendants,
Residence, Pocatello, Idaho.

[Endorsed]: Filed Nov. 2, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Order Appointing Special Examiner.

Upon reading the Stipulation between the respective parties by their solicitors, IT IS ORDERED by the Court that Daniel Hamer, on account of his experience in such matters, be and he is hereby appointed special examiner herein, under the Sixty-seventh rule as amended. The said special examiner shall take the testimony in behalf of both complainants and defendants, and is authorized to take the same at the places and times in such Stipulation mentioned and in accordance with the convenience and requirements of the parties. Said testimony shall be given orally by witnesses and be taken down stenographically by such examiner, and thereafter reduced to typewriting, and when duly certified the same shall be admitted in evidence.

Done in the city of Moscow, this 2d day of November, 1909.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Nov. 2, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Stipulation [Continuing Taking of Testimony].

IT IS HEREBY STIPULATED by and between the respective parties in the above-entitled cause, through their respective counsel, that the taking of testimony in this cause heretofore fixed for December 20th, 1909, shall be changed to the 10th day of January, 1910, at the same place and hour. This is done for the convenience of all parties concerned.

RICHARDS & HAGA,
Attorneys for Plaintiffs,
Residence, Boise, Idaho.
CLARK & BUDGE,
Attorneys for Defendants,
Residence, Pocatello, Idaho.

[Endorsed]: Filed Dec. 1, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Stipulation [Re Publication of Depositions and Testimony].

The defendants hereby consent that the depositions and testimony in said cause may be published at any time upon the request of the attorneys for the plaintiffs, and that said depositions may be delivered to said attorneys upon their request, in order to enable them to prepare their brief herein.

CLARK & BUDGE,
Attorneys for Defendants.

[Endorsed]: Filed Feb. 23, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States, for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Opinion.

July 15, 1910.

RICHARDS & HAGA, Attorneys for Plaintiffs.

CLARK & BUDGE, Attorneys for Defendants.

DIETRICH, District Judge:

This suit was brought by the plaintiffs for the purpose of having cancelled a certain contract dated July 30th, 1908, to which they are parties of the first part, and the defendants are parties of the second part. The defendants are husband and wife, and inasmuch as the latter took no part in the transactions involved other than to sign the contract, for convenience Harry G. King will be referred to as the only real party defendant in interest. The claim of the complainants is that in order to induce them to execute the contract the defendant made false representations of material facts, and cancellation is asked upon the ground of the alleged deceit. By the contract it was agreed that upon certain conditions and for certain considerations therein specified the defendant would transfer to a corporation to be formed, in which all of the parties named were to be stockholders, four hundred and eighty acres of land, in Lemhi County, Idaho, supposed to contain valuable coal measures. The defendant was to be paid seven thousand five hundred dollars at the time the contract was executed, and twenty-two thousand five hundred dollars on or before the first day of January, 1909, on or before which date the plaintiff Arthur H. Lamborn was also to execute and deliver to the defendant four several promissory notes, payable at different times, aggregating

the sum of ten thousand dollars, the last of said notes being payable on the first day of January, 1913. The corporation to be organized was to have a capital stock of the par value of two hundred thousand dollars, of which the defendant was to subscribe for one-fourth, Richards for one-fourth, and Lamborn for one-half. Upon the completion of the organization of the corporation and the transfer to it of the coal lands, it was to issue its bonds in the amount of eighty thousand dollars, secured by a first mortgage upon the lands, forty thousand dollars of which bonds were to be delivered to the defendant, seven thousand five hundred dollars to Richards, and thirty-two thousand five hundred dollars to Lamborn.

Soon after the agreement was entered into, the parties, through the management of the plaintiff Richards, commenced work upon the property for the purpose of developing it, and also for the purpose of supplying the local market with commercial coal, and this work was continued until February, 1909. In the meantime, by mutual consent, the terms of the agreement had been modified in some particulars, and to the satisfaction of the defendant he had been paid an aggregate of twenty-one thousand dollars in money and had received notes for the balance. The property was not transferred to a corporation, as contemplated, but in fulfillment of his obligations, the defendant executed a deed, which is still held in escrow.

The plaintiffs pray for a rescission of the contract, for reimbursement of the money which they have paid, and also for a return and cancellation of their

notes which are still outstanding. In substance, the charges of fraud are that the defendant, for the purpose of inducing the plaintiffs to enter into the contract, falsely represented, first, that the vein from which the coal had been mined (at that time concealed from view) corresponded to and was identical with the measure of stratum exposed in the new workings; and, second, that the entire breast of the measure from which the coal had been taken was clean, and that the coal did not require sorting; and, third, that during the eleven months immediately preceding there had been taken out of the property and sold upon the local market for domestic purposes twenty-three hundred tons of coal, and for a mine in the immediate vicinity an additional amount of three hundred tons.

Very briefly stated, the facts are that the defendant purchased the property about a year before the contract was executed, and was working and selling coal from it upon the local market. The attention of Richards, who was a mining promoter, and who was temporarily residing at Salmon City, was in some way attracted to the property, and he suggested that he undertake the sale of it for King, with whom he was upon friendly terms. Accordingly, in March, 1908, while he was in Colorado, and after some correspondence between him and the defendant, an agreement was entered into by which the defendant was to sell to Richards the property for the sum of eighty thousand dollars, the real purpose of the agreement, however, being to enable Richards to negotiate a sale to a third person, it being understood that he was to

have as commission all that he received above fifty thousand dollars. In due time Richards went east, and in New York City met Lamborn, with whom he had become acquainted some time before in Mexico. Whether it was the intention of Richards to sell the property to Lamborn or simply to enlist his assistance in making a sale to some other person is unimportant, for however that may be, Lamborn himself appears to have at once become interested, and after some inquiry from Richards and also directly from King by telegraph, he decided to make an investment if satisfactory terms could be agreed upon. Richards returned to Idaho, and later Lamborn followed him, reaching Salmon City the letter part of July, 1908. After some inquiry and negotiations the contract referred to was executed.

Coming now to a consideration of the specific charges of misrepresentation, it appears that at the time of the execution of the contract neither Lamborn nor Richards had any personal knowledge of the extent and quality of the coal measures, or of the amount of coal which had been mined and marketed during the preceding year. The chamber from which the coal had been taken by the defendant had caved it, so that the breast of the vein was at that time not open to inspection. No definite information was available except from the defendant himself, and it is reasonably clear that the plaintiffs, especially Lamborn, relied upon the representations made by the defendant, who was a banker and was apparently held in high esteem in the community in which he lived. It is true that before Richards went to Colo-

rado, and later to New York, he had upon the ground acquired some general knowledge of the property, but he cannot be said to have had any personal knowledge of the facts concerning which it is claimed the defendant made the representations.

When Richards and Lamborn visited Salmon City there was exposed a layer or stratum of inferior coal in a new drift or tunnel which was being opened up, and the first charge is that the defendant represented that this layer corresponded to the measure from which the coal had been marketed during the preceding year, thus giving the impression that the quality of the coal rapidly improved as the development work advanced. As a matter of fact, it turned out that there was no relation between the stratum thus exposed and the measure from which the coal had been taken. For various reasons, however, which it is not necessary here to set forth, I have concluded that the charge in this respect and the evidence adduced in support of it are insufficient to warrant the granting of the relief prayed for.

The second charge is that the defendant represented that the coal taken from the old room or chamber was clean and did not require sorting. Both of the plaintiffs testified positively that such statements were made, and the undisputed proof is that when the vein was again uncovered, in the progress of the development work during the latter part of the year 1908, the coal found therein was not clean, but required sorting before it could be marketed. While I think that by a preponderance the evidence supports the charge, it may be doubted

whether, in the light of the entire record, it is so satisfactory that if there were no other charge a Court would by it alone be moved to grant the extraordinary relief prayed for; the proof rests entirely in the uncorroborated testimony of the plaintiffs, who are vitally interested, and who in this respect are contradicted by the defendant.

The most serious charge is that the defendant represented that he had mined and sold upon the local market, during the eleven months he had possession of the property, twenty-six hundred tons of coal. The plaintiff's version is that while Richards and Lamborn were still in New York, at the suggestion of Lamborn a telegram was sent to the defendant by Richards making inquiry upon this point, in reply to which the defendant telegraphed that the amount was twenty-three hundred tons; and again, after Richards and Lamborn came to Idaho, during the negotiations, the subject was discussed, and the defendant then claimed that he had mined twenty-six hundred tons, of which he had sold upon the local market for domestic uses twenty-three hundred tons and to the Copper Queen Mine, located in the vicinity, the further amount of three hundred tons. The telegrams referred to were lost, and there is only parol proof of their contents, the plaintiffs testifying that the defendant telegraphed "twenty-three hundred tons" and the defendant testifying that he telegraphed "*about* twenty-three hundred tons." The defendant further denies that he ever stated that he had mined or sold twenty-six hundred tons, but contends that the three hundred tons sold to the Copper Queen

Mine was included in the twenty-three hundred. The most favorable view to the defendant that can be taken is that he represented that he had taken out about twenty-three hundred tons, two thousand of which he had sold upon the local market for domestic purposes and three hundred to the Copper Queen mine.

Along in January, 1909, the plaintiff Richards accidentally came into the possession of the defendant's scale or weigh-book stubs for the preceding year, covering a part of the eleven months during which the defendant had operated the mine, from which it was to be inferred that the output was very much less than the defendant had represented it to be. Already suspicious, with this evidence in his possession, Richards, concluding that his surmises were well founded, informed Lamborn of the situation, and soon thereafter both of the plaintiffs concluded to disaffirm the contract, and so advised the defendant. While it is to be conceded that the proof of the actual output for the eleven months is not comprehensive or complete and does not to a certainty exclude the hypothesis that the defendant's representations were correct, still from the record as a whole the conclusion is irresistible that twenty-three hundred tons is grossly in excess of the amount actually mined or sold. The weigh-check stubs cover only a portion of the period, but when considered together with the other testimony there is no reasonable basis for estimating the amount actually mined in excess of one thousand tons, and the more reasonable inference is that it was nearer eight hundred tons. We not

only have the weigh-check stubs, but the witness Albee, who was formerly the bookkeeper of the Copper Queen mine and was actively engaged in that capacity from August to December, 1907, testified that while he was with the Copper Queen Mining Company it did not receive to exceed twenty-five tons from the defendant, and it is to be inferred that thereafter the mine was shut down and there were no deliveries of which he was not cognizant. There is the further fact that without any apparent reason or explanation the demand for coal in the community during the winter of 1908 and 1909 was scarcely half what it was the preceding year, if the defendant's representations are assumed to be true. Moreover, at the trial the defendant made no attempt to explain these facts or to break the force of the inferences logically to be drawn therefrom. When upon the witness-stand he contented himself simply with saying that at the time the contract was executed and also at the time he testified he believed the representations to be substantially true, but no effort was made to adduce evidence or to throw any light upon the facts in evidence, from which the Court could intelligently and reasonably share in such a belief. True, the burden was upon the plaintiffs not only to show what representations were made, but further to prove their falsity, and it was not incumbent upon the defendant to assume the burden of establishing their truth. But the facts adduced by the plaintiffs were ample to make a *prima facie* case. It was difficult, if not absolutely impossible, under the circumstances for the plaintiffs to prove to a moral certainty

just what amount of coal was mined or sold; complete records were not kept, or at least if they were, they were not accessible to the plaintiffs. When the plaintiffs rested, the obligation was upon the defendant, who was presumably in possession of the facts, to explain away the reasonable inferences to be drawn from the evidence adduced on behalf of the plaintiffs. He had represented that three hundred tons of coal were delivered to the Copper Queen mine; apparently not to exceed twenty-five tons had actually been delivered. Certainly if three hundred tons, or approximately that amount, had been delivered, the defendant could have brought forward proofs thereof, and under the circumstances his failure to do so must be construed strongly against him. The defendant was not a stranger to business methods, and it is quite incredible that he would have operated a property representing an investment of thirty thousand dollars for the period of approximately a year at great expense, without keeping some account or at least acquainting himself with sufficient facts from which he could determine with a reasonable degree of certainty what his expenses were, and also how much coal was mined and marketed, and what it sold for. It may not have been possible to make conclusive proof of the exact amount of the output, but it should not have been difficult, and we must assume that it would not have been difficult to make proof of the approximate amount, and the failure of the defendant to attempt to explain away or throw any light upon the evidence adduced upon behalf of the plaintiffs is to be interpreted as an admission

upon his part that such evidence, together with the reasonable inferences to be drawn therefrom, fairly discloses the actual facts. I recognize the rule that a court of equity should not lend its assistance to the cancellation of a contract for alleged fraud unless the misrepresentations are established by clear and convincing proof (Atlantic Delain Co. vs. James, 94 U. S. 207), but I am also mindful of the further principle that, "All evidence," as was said by Lord Mansfield in Blatch vs. Archer (Cowper, 63, 65), "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted," and that, "The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute which is within his power and which rests peculiarly within his own knowledge frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence if adduced would operate to his prejudice." *Starkey on Evidence,* Vol. I, p. 54.

There can be no serious controversy that the representations related to a material matter, and that the plaintiffs relied upon them, and, by reason of such reliance, were induced to execute the contract. It is aside from the point to argue that the capacity of the property was in excess of the amount stated to have been the output for the year 1907. Undoubtedly more than twenty-three hundred tons could be mined during the eleven months, but the extent of the demand for coal was a factor entering into the value of the property, as well as the extent of the supply. From

the testimony it is very clear that the parties in negotiating the contract considered the practicability of operating the mine upon the basis of a growth of the demand from twenty-three hundred or twenty-six hundred tons during the preceding year to a larger amount from year to year, as the availability of the supply became better known, and as the population and requirements of the community increased. Obviously the difference between a demand for one thousand tons and a demand for two thousand tons per year at the outset was a material consideration, and the defendant must have known that the question was by the plaintiffs thought to be highly important, otherwise inquiry would not have been made by telegraph; and when he stated that he had marketed twenty-three hundred tons the preceding year he should have realized that such a representation would in all probability enhance the value of the property in the estimation of the purchasers. Upon this issue, therefore, the finding must be in favor of the plaintiffs.

But upon behalf of the defendant it is further urged that even with such a finding the plaintiffs should not succeed, because they have neither alleged nor proved that they have suffered any actual pecuniary loss or damage by reason of the deceit. In the Bill of Complaint, at the close of the substantive part thereof, there is the averment that "all which actings, doings and pretenses of said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your auditors in the premises," but it is doubtful whether this was intended as a charge that the plaintiffs suffered any

pecuniary loss by reason of the misrepresentations, for there is no direct or positive evidence of such loss, and indeed, as I understood, counsel at the oral argument admitted that the cause was tried upon the theory that it was unnecessary either to allege or to make proof of actual loss in cases of this character. It is authoritatively settled in the federal courts that in actions at law for damages on account of fraudulent representations made by the vendor, the vendee is entitled to recover only the difference between the actual value of the property and the amount paid for it, and not the difference between the actual value and the value which it would have had if the vendor's representations concerning it had been true, *Sigafus vs. Porter,* 179 U. S. 116; and it logically follows that in an equity suit to cancel a contract no substantial pecuniary loss is shown to have resulted to the party deceived unless it appears that the actual value of the property was less than the amount which the purchaser paid or agreed to pay for it. Upon that theory it must be admitted that the evidence here is insufficient affirmatively to disclose any substantial damage to the plaintiffs by reason of the misrepresentation, for no proof at all as to values was offered or received.

The rule is sometimes stated generally that neither a court of equity nor a court of law will exercise remedial jurisdiction on behalf of a party who has not suffered or is not threatened with any pecuniary loss. However, if any pecuniary loss at all is shown to have resulted, the Courts will not inquire into the extent thereof. "It is sufficient if the party misled

has been slightly prejudiced, if the amount is at all appreciable." *Pomeroy's Equity Jurisprudence,* sec. 898. The decisions, however, cannot be said to be in harmony, especially in cases where suit is brought to cancel an executory contract, and while the question is not free from doubt, I have concluded that in view of the peculiar and complex relations which will continue to exist between the parties if the contract remains in force, and the further fact that it has been executed only in part, the relief prayed for should be granted. After a reasonably thorough examination of the decided cases, I am convinced that the rule for which the defendant contends is not universally recognized, and that it should not be held to debar the plaintiffs from succeeding in this case. In *Pittsburg L. & T. Co. vs. Northern C. L. Ins. Co.,* 140 Fed. 888, cited for the defendant upon the question of the measure of damages in an action at law for deceit, the Court, in distinguishing between the rule in such a case and in one like this, says: "He (the purchaser) may anticipate more and be falsely led to expect it, on the strength of which he may be entitled to be relieved from the bargain. But if he holds onto it, he cannot claim damages for the deceit, if he has suffered no loss, which is the case where, although not getting all that he had the right to expect, he gets after all the worth of his money." And in Mather vs. Barnes, etc., 146 Fed. 1000, it is said: "Neither does it matter, if misrepresentation be proved, that the bargain, even so, was a good one, from which the purchaser is likely to sustain no loss. In an action of deceit, no doubt, this would be rele-

vant on the question of damages, in order to show that there were none; * * * * * but not so upon a bill to rescind. * *, * * * The purchaser is entitled to the bargain which he supposed and was led to believe that he was getting and is not to be put off with any other, however good. It is of no consequence, in the present instance, therefore, that the plaintiffs got coal lands of intrinsic value, which are worth, perchance, all that was paid for them, if they were fraudulently induced to believe, by misrepresentations for which the defendants are responsible, that the Upper Freeport vein, for which they negotiated, underlaid the whole property, whereas in fact it extends over but a comparatively limited part." To the same effect is *Hansen vs. Allen,* 117 Wis. 61, 93 N. W. 805. See, also, *Clapp vs. Greenlee,* 100 Iowa, 586, 69 N. W. 1049, and *Brett vs. Cooney,* 75 Conn. 388, 53 Atl. 729. In *Clark vs. White,* 12 Peters, 178, *Kimball vs. West,* 15 Wall. 379, *Atlantic Delain Co. vs. James,* 94 U. S. 207, and *Southern Development Company vs. Silva,* 125 U. S. 247, may be found general expressions to the effect that the plaintiff must have acted upon the false representations to his damage or injury, but in none of these cases does the precise question here under consideration appear to have been involved. However, some of the decisions from the state courts doubtless fully support the general rule as contended for by the defendant, notably *Wenstrom, etc. vs. Purnell,* 75 Md. 113, *Cochran vs. Pasacault,* 54 Md. 1, *Bailey vs. Fox,* 20 Pac. 871, *Marriner v. Dennison,* 20 Pac. 390,

Strader vs. Strader, 151. Ind. 339, 51 N. E. 479. The hardship of such a rule is strikingly illustrated by the present case. The property in controversy is of an uncertain speculative value, and, obviously, it would be quite impossible, with any degree of assurance, to prove even what it could be actually sold for upon the market as a whole. But when we further consider the complex relations which the parties will sustain to the property after the contract is once fully executed, and the indefiniteness and inter-relation of their several interests, manifestly the question whether or not the plaintiffs are getting their money's worth may be the subject of speculation and conjecture, but not of intelligent proof. For that reason alone, if for no other, the plaintiffs' remedy at law is clearly inadequate, and if they cannot disaffirm the contract and recover back what they have paid, they are practically without any remedy at all. The elasticity of the value which might be placed upon the property in case that were a vital issue is exemplified in the testimony which was offered upon behalf of the defendant. The witness Pollard, who formerly owned the property, and sold it to the defendant, states that if he owned the property now he wouldn't take two hundred and fifty thousand dollars for it. The defendant himself testified that it is of a value in excess of what he was to be paid for it, and that he would now be glad to take it back and return to the plaintiffs what he has received from them had his Honor not been called into question by this suit, but in his answer to the bill he admits that he declines

and refuses to return any part of the money or any of the notes, and it is quite incredible that, before the suit was commenced, the plaintiffs would have been unwilling to have obtained without litigation the precise relief which they are attempting to procure by this suit. However, that may be, if we assume that the defendant at the present time, in good faith, believes the property to be worth at least the contract price to be paid for it, that is of little comfort and of no avail to the plaintiffs, for, whatever may be his motive, the defendant declines to rescind, and, of course, there is no substantial assurance that any other person whose honor is not involved would purchase the property for that price. The result is that if the finding of material misrepresentation is well-founded, the plaintiffs have been wronged, and yet, under the rule invoked by the defendant, they are practically without remedy, unless they can, by satisfactory proof, show that the market value of the property, which, in the nature of things, has no market price, is less than the amount which they agreed to pay for it,—a hazardous, if not an impossible, undertaking. If they were here hanging on to their contract, and were asking for damages for deceit, it would be entirely reasonable that they should assume the burden of showing to what extent, if at all, they have been damaged; having voluntarily elected to pursue such a course, it would be proper for them to assume the hazards thereof. But they are here not claiming any advantage from the contract, but, upon the other hand, are waiving all rights thereunder, and are simply asking that the defendant return to them

what he has received. I like better the view that fraud vitiates a contract, and that if, promptly upon discovery, the deceived party disaffirms an executory contract, a court of equity will, without inquiry into the extent of his probable or possible injury, afford him proper relief, by cancelling the invalid instrument and requiring the return of that part of the consideration, if any, which has been paid. It should be added that there is no room for the suspicion that the plaintiffs are seeking to be relieved from their bargain because of a change of conditions unfavorably affecting the value of the property. At the time the contract was negotiated, it was hoped that a railroad would be built, and that is now an accomplished fact. By reason of the construction of the railroad, and because of other conditions, real estate values in the community have been stimulated, and not depressed, and it is conclusively shown that the property is now worth largely in excess of what it was worth at the time the contract was executed.

There remains for consideration the question whether or not the plaintiffs have come into court with clean hands. So far as Lamborn is concerned, there is no substantial evidence of a disposition on his part to deal dishonestly with the other two parties to the contract. It is not entirely clear just what he conceived Richards' relation to the defendant to be, or just what the understanding between him and Richards was as to the commission which the latter was to receive. His own testimony, when considered in connection with other phases of the record, suggests the suspicion that he was willing

that the defendant should act upon the assumption that he and Richards were co-operating together for their mutual interests, and that he, Lamborn, was standing alone, whereas, as a matter of fact, it was understood between Lamborn and Richards that they were co-operating together, and were mutually to share in the commission which King supposed he was paying to Richards alone. But it is not thought that the evidence in this respect is sufficient to warrant a finding of deceit upon his part, or of conduct which should debar him from obtaining relief at the hands of a court of equity. As to Richards, however, the case is materially different, and were he alone asking rescission I should be strongly inclined to dismiss the bill, upon the ground that he is to such an extent implicated in efforts to deceive in connection with the sale of the property that his prayer for equitable relief should be denied. In the first place, it was at his suggestion that the original contract between himself and King was put into such form as to enable him to deceive those whom he intended to induce to purchase the property. Moreover, while he was in New York negotiating with Lamborn, under the latter's direction he sent a telegram to King proposing certain terms of purchase, but as soon as he could get away from Lamborn he secretly telegraphed to King what answer to make to the first telegram. And again, in connection with the execution of the contract, he made certain pretenses of payment in the presence of Lamborn, which his sworn testimony does not very satisfactorily explain. Upon the whole, the record leaves no room for doubt that, to

accomplish his ends, Richards was willing to deceive, and I am satisfied that he did not act with entire candor towards his associates, but secretly pretended to be co-operating confidentially first with the one and then with the other, thus leading King and Lamborn each to believe that he was receiving the exclusive benefit of his services. Apparently, however, it is impossible to deny relief to Richards without doing injustice to Lamborn or to King. To grant relief to Lamborn and to deny it to Richards would leave the status of the property in an anomalous condition, probably to the injury of the defendant; and to deny relief to both of the plaintiffs because of the misconduct of Richards would, in effect, be to hold Lamborn responsible for that for which he was in no wise to blame. It is therefore thought that a decree should be granted substantially in compliance with the prayer of the bill, and it will be so ordered.

[Endorsed]: Filed July 15, 1910. A. L. Richardson, Clerk.

JOURNAL ENTRY.

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, on Friday the 15th day of July, 1910. Present, Hon. FRANK S. DIETRICH, Judge.

No. 131—Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS

vs.

HARRY G. KING and MARIA J. KING, His Wife.

[Order Re Decree.]

On this day was announced the decision of the Court in this cause heretofore argued and submitted, which decision is in writing and on file herein and is to the effect, and it is ordered that a decree be granted in favor of plaintiffs and against defendants as demanded in the prayer of the Bill of Complaint in said cause.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof:

IT IS ORDERED, ADJUDGED AND DECREED, that the contract of sale and notes referred to, and set forth in the bill, be and hereby are cancelled, rescinded and declared utterly void and of no effect, and the said defendants, Harry G. King and Maria J. King, and each of them, are hereby restrained and enjoined from setting up or claiming any rights thereunder; and,

IT IS FURTHER ORDERED, ADJUDGED

AND DECREED, by the Court that the said Harry G. King is held liable for, and he is required to pay to the complainants, Arthur H. Lamborn and John G. Richards, the whole amount of money heretofore paid to him on account of said contract, to wit: $6,000, paid July 20, 1908; and $15,000, paid January 1st, 1909, with interest thereon from June 8th, 1909, at the rate of seven (7%) per cent per annum, making a total aggregate of Twenty-two Thousand and Eight Hundred ($22,800) Dollars; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court, that the said defendants Harry G. King and Maria J. King, surrender and deliver up for cancellation the said contract of sale; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said defendants, Harry G. King and Maria J. King surrender and deliver up for cancellation the said notes, to wit: Two notes, each executed by the plaintiff, John G. Richards, on or about the 30th day of July, 1908, each for Seven Hundred and Fifty Dollars ($750.00); three notes, each executed by the said complainant, John G. Richards, on or about January 1st, 1909, each for the sum of Two Thousand and Five Hundred Dollars ($2500.00); four notes, each executed by the complainant Arthur H. Lamborn on or about the 1st day of January, 1910, each for Two Thousand and Five Hundred Dollars ($2,500.00); and falling due on the 1st day of January, 1910; the 1st day of January, 1911, the 1st day of January, 1912, and the 1st day of January, 1913, respectively. And the said de-

fendants, and each of them, are hereby restrained and enjoined from setting up or claiming any rights thereunder.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that the complainants have and recover their costs herein, in the sum of Four Hundred and Three, and Thirty-five Hundredths ($403.35) Dollars.

Done in open court this 29th day of August, 1910.

FRANK S. DIETRICH,
Judge.

The defendants are granted 60 days from date of this decree in which to present petition for rehearing.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed August 29, 1910. A. L. Richardson, Clerk.

[Testimony.]

In the Circuit Court of the United States of America in and for the District of Idaho, Southern Division.

IN EQUITY—No. ——.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiff

vs.

HARRY G. KING and MARIA J. KING His Wife,

Defendants.

Examination of witnesses, beginning the 6th day of November, 1909, at the office of Messrs. Clark & Budge, in Pocatello, Idaho, before Daniel Hamer, Special Examiner appointed by the Court to take the testimony on behalf of the respective parties hereto, under the 67th Rule of Equity, as amended, pursuant to stipulation of the respective parties hereto. Present: J. H. RICHARDS, Esq., Counsel for Plaintiffs, and

Messrs. CLARK & BUDGE, Counsel for Defendants.

By request of parties, it is ordered that this testimony be taken by question and answer.

[Testimony of Robert Forrester, for Plaintiffs.]

ROBERT FORRESTER, a witness produced on behalf of the plaintiffs, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Mr. J. H. Richards, of counsel for the plaintiffs, as follows:

Question 1. State your name, age, residence and occupation.

Answer. My name is Robert Forrester; age, 45; residence, Salt Lake City, Utah; occupation, geologist and mining engineer.

Q. 2. How long have you been engaged in your present occupation?

A. I have followed geology and mining engineering ever since I got out of school.

Q. 3. About how many years ago?

A. About 24 years.

Q. 4. I wish you would state, briefly, what exper-

ience you have had in the lines of your profession, and where?

A. After getting through school, I spent two years studying mining and mining methods and geology throughout Great Britain; then came to the United States and did the same in Pennsylvania, Missouri, Kansas, Colorado, Utah, New Mexico, Montana, Idaho, Canada and Old Mexico.

Q. 5. State what particular experience you have had as a geologist and engineer in coal mining.

A. I am at present geologist for the Utah Fuel Company, the largest coal mining operators in Utah. I am also Consulting Mining Engineer for the Denver & Rio Grande Railroad system; and in the way of opening up mines and putting them upon an operating basis, I have opened the Diamondville mine, in Wyoming, the Home Coal Company's mine, Coalville, Utah. That last mine was open, but I had to rearrange it and take it from a losing proposition and put it on a paying basis. I opened the Sterling mine for the—or the Morris mine; it is for the Sterling Coal & Coke Company, in Utah. I have opened all of the mines now operated by the Utah Fuel Company and the Pleasant Valley Coal Company, five in number. I have opened the Summerset mine in Colorado, the Perrins-Brick mine in Colorado, and have examined the coal *folds* and made reports upon them, both geological and from a mining point of view, in the Rocky Mountain region from Canada to as far as Esperanza, in Old Mexico. So that the whole of my time has been taken up with a geological study of the *folds*

(Testimony of Robert Forrester.)

and the opening of mines and passing upon properties, either for a purchase or operation.

Q. 6. In your last answer when you speak of mines—you used the word "mines"—do you have reference to coal mines, or other mines?

A. I have reference principally to coal mines, but I have had a great deal of experience in the operation of other kinds of mines, but have not laid any stress upon them.

Q. 7. Are you acquainted with the defendant in this action, Harry G. King? A. Yes, sir.

Q. 8. When and where did you meet him?

A. At Salmon City, Idaho.

Q. 9. When?

A. I left Salt Lake May 8th, 1909, so that I reached Salmon City about the evening of the 10th, and met Mr. King the same night.

Q. 10. What was your purpose in going to Salmon City when you met Mr. King?

A. To make a report upon the coal possibilities for Mr. McCutcheon, who was building the Gilmore & Pittsburgh Railway from Armstead, Montana, to Salmon City, Idaho.

Q. 11. What, if any, coal property did you examine? Did you examine the property claimed to be owned by Mr. King at that time, near Salmon City?

A. I examined what was known as the King mine, which formerly went under the name of the Pollard.

Q. 12. Can you give a description of the land covered by that mining property?

A. The SE. ¼ and the SW. ¼ of Section 1; the

(Testimony of Robert Forrester.)

NE. ¼ of the SE. ¼, the S. ½ of the SE. ¼, and the SE. ¼ of the SW. ¼ of Section 2, in Township 21 North, of Range 21 East,—of the Boise Meridian, I believe it is.

Q. 13. Who, if anyone, directed you where to go when you were in Salmon City, for the purpose of examining the property you have just described?

A. Mr. King furnished a man—I believe his name is Frank Miller. He was acting as Foreman at the King mine. He met me at the hotel the following morning and had a saddle-horse for me and one for himself, and we rode up the Salmon River, upon the East bank, and afterwards went up to the King property in the afternoon.

Q. 14. I wish you would describe this King property, from a topographical standpoint, as nearly as you can?

A. The King property upon the East end comes close to Salmon City; that is, the Brooklyn portion of Salmon City.

Q. 15. That is an addition to Salmon?

A. I believe so. The Brooklyn portion is situated upon the west side of the Salmon River, while Salmon City proper is on the east side. The property then extends west an extreme distance of a mile and three-quarters, crossing the Middle Fork of Jessie Creek. The mine is located upon the SE. ¼ of the SW. ¼ of Section 2, and the main entry runs practically south, a distance of about 600 feet; so that the mouth of the mine in a straight line is a little over

(Testimony of Robert Forrester.)

one mile and a half west of the nearest point on the Salmon River.

Q. 16. Please describe the openings that you found upon this property.

A. The opening consists of a main entry, the mouth of which has been described as falling upon the SE. ¼ of the SW. ¼ of Section 2; it extends in a general southerly direction a distance of about 600 feet, to the face, which is within about 25 feet of the south line of Section 2, and about 300 feet west of the south quarter corner of Section 2. At a point about 100 feet from the mouth of the mine the old Pollard workings commence. The extreme end of them are about 50 feet north of the face of the main entry, and roughly extracted the carbonaceous material for about 50 feet above the main entry. This main entry, on account of it having been caved, has been reopened along the lower side of the Pollard workings, and when the inner room of the Pollard workings was reached a room (No. 1) was started off on a slant of about 25 degrees to the right of the main entry, and has been advanced a distance of about 50 feet. The face of Room No. 1 and the face of the entry were the only places available for the extraction of this carbonaceous material.

Q. 17. Describe what those—the faces—showed, in relation to the quantity of coal and waste material?

Mr. CLARK.—That is objected to as incompetent and immaterial, and for the reason that these workings are not shown to have been in the same condition that they were in at the time the contract in this case

was entered into.

Mr. RICHARDS.—We expect, in the further taking of the testimony of other witnesses, to show this condition.

Answer. The section exposed at the face of Room No. 1 is as follows, reading from the roof downwards:

Shale, 1 foot 3 inches exposed;

Soft arenaceous shale, 10 inches;

Coal—(which allow me to explain, has been used here as a simplification, which further forward in my report I call attention to the fact that I called the carbonaceous material, or bone coal, which it really was, coal, in the report; so that, although it is named coal, it is not coal, but really a bone coal)—Coal, 8 inches;

Soft shale, 1 inch;

Coal, 6 inches;

Soft arenaceous shale, 1¾ inches;

Coal, 4¾ inches;

Soft arenaceous shale, half an inch;

Coal, 4 inches;

Soft arenaceous shale, 1 inch;

Coal, 2½ inches;

Soft arenaceous shale, 7 inches;

Coal, 9 inches;

Coal, 1¾ inches;

Coal, 6 inches;

Soft arenaceous shale, 4½ inches;

Coal, 7 inches;

Soft arenaceous shale, 5½ inches;

Coal, 6 inches;

(Testimony of Robert Forrester.)

Hard carbonaceous shale, 3⅓ inches;
Fire clay, 6 inches;
Arenaceous sulphur shale, 4 inches;
Sandstone, 7 inches exposed.

Which the sandstone forms the floor of the vein or bed.

The section at the face of the main entry, reading from the top downwards:

Shale, 1 foot 3 inches exposed;
Black carbonaceous shale, 3 inches;
Coal, 6 inches;
Soft arenaceous shale, 1 inch;
Coal, 7 inches;
Soft arenaceous shale, 1¾ inches;
Black carbonaceous shale, 3 inches;
Coal, 3 inches;
Soft arenaceous shale, ¾ of an inch;
Coal, 3 inches;
Black carbonaceous shale, 8 inches;
Coal, 2½ inches;
Black carbonaceous shale, 5 inches;
Coal, 3 inches;
Black carbonaceous shale, 1 foot 4 inches;
Sandstone fissile, 6 inches;
Coal, 7 inches;
Black carbonaceous shale, 2 inches;
Sandstone soft fissile, 3½ inches;
Coal, 7 inches;
Black carbonaceous shale, 6 inches;—which forms the floor of the bed at this point.

Mr. RICHARDS.—Q. 18. What percentage, if

(Testimony of Robert Forrester.)
you can tell, of that face in each breast, was what you would call coal?

Mr. CLARK.—May it be understood, Judge Richards, that the objection that I made a moment ago, as to this testimony being incompetent and immaterial, for the reason that it is not shown that this mine was in the same condition that it was when the contract set up in the petition is alleged to have been made, may go to all this character of testimony;

Mr. RICHARDS.—That is stipulated.

(The Special Examiner thereupon repeated Question 18.)

WITNESS.—Well, there is no coal—

Mr. RICHARDS.—Well, that we will come to afterwards.

WITNESS.——but bone coal and carbonaceous material. If it is taken in that light, I can give it. At the face of the room, 54 per cent was of this carbonaceous bone coal. At the face of the entry, 36 per cent was this carbonaceous material, or bone coal.

Q. 19. What if any, change had taken place in the quantity of what you call coal, in those entries, during the last 50 feet run from the breast toward the mountain?

Answer. At the face of the room, the total thickness of the bed was eight feet 5¼ inches. Of that there was 3 feet 10¼ inches of rock, and 4 feet 7 inches of this bone coal—called coal—making it 46 per cent rock and 54 per cent bone coal. At the face of the entry, the total thickness of the vein was 8 feet 10½ inches, of which 5 feet 8 inches was rock

(Testimony of Robert Forrester.)

and 3 feet 2¼ inches of it bone coal, making 64 per cent rock and 36 per cent of bone coal, showing a decrease of 18 per cent in the carbonaceous material in a distance of 50 feet. However, this does not show upon its face, without reference to these sections, the full meaning of this decrease in percentage, because the beds of bone coal, at the face of the main entry it became much thinner, and it became wider separated from each other. So that it makes the face of the main entry, in reality, absolutely worthless from its carbonaceous content point of view.

Q. 20. What, if any, commercial value has this material you call bone coal?

A. It has none.

Q. 21. What, if any, statement did Mr. King make to you while you were in Salmon City, relative to the quantity of coal he had mined and marketed from that property?

Mr. CLARK.—Just a moment. That is objected to as incompetent and immaterial. I think for the present I will just let it go at that.

WITNESS.—As I have neglected to bring my field-notes with me, I can only state that from memory, and if it serves me right he told me that they had mined and sold 3,000 tons.

Mr. RICHARDS.—Q. 22. Did he state within what time he had mined and sold 3,000 tons.

A. He spoke of the year.

Q. 23. Do you remember what year?

A. I took it to be immediately preceding my visit; it must have been, because he only came into posses-

sion of the property on February 26th, 1907.

Q. 24. From your examination of that property, how much in your judgment of coal had been mined therefrom, and why you think so?

A. Well, taking the entire carbonaceous content and the amount of area extracted in Pollard's time, and in fact during the entire life of the mine, there could not have been over 3,000 tons. Of course, the material sold, which I saw some of it in a coal scuttle, or rather, I didn't see the material sold, but some that was in the bank which he was apparently using there, I should say that there was a great deal of slate in it, and if you include the weight of slate and that, it is hard to tell what amount of coal was extracted.

Q. 25. From the calculations you have made of the entire cubic contents of the coal vein, about how many tons (including waste and coal) have been extracted, as shown by those workings?

A. I haven't made any calculations as to the amount of waste that is there, because I have shown it in a percentage of the section, wherein the rock is as high as 64 per cent.

Q. 26. From your examination of that property, can you state whether or not it was possible to have mined therefrom about 3,000 tons of coal?

A. Not in Mr. King's time; it was impossible to do it, because that 3,000 tons includes all of the operations of Pollard, who operated a larger part of the mine before King came into possession. So that King had only about 600 feet of an entry and

(Testimony of Robert Forrester.)

about 50 feet of one room, which is about eight to nine feet wide; so that he could not possibly get out 3,000 tons in that area.

Q. 27. Have you any information or knowledge as to what, if any, changes have taken place in those underground workings, since about July, 1908, up to the time you examined them?

A. Well, all that I know is the condition of the workings at the time I examined it. What it was after that I could only see from the vein in following it from the surface inwards.

Q. 28. You had no knowledge as to when any particular part of the work had been done?

A. Oh, no. It was apparently following along on the lower edge of the lower workings, because you could see the old timbers and the old waste walls still standing.

Q. 29. Did any of these two workings (the drift or the main level) show any recent work when you were there?

A. Just the main entry; it showed that it had been retimbered and cleaned up; and the Mine Foreman also told me that it had been, when I asked him if they had not been going through on the lower edge of the old workings.

Q. 30. That is back towards the mouth?

A. Yes, sir, from the mouth into what I call Station 105, which I would estimate would be about 350 feet from the mouth, it followed along the old workings of Pollard; and from Station 105 a distance of about 100 feet was the old entry of Pollard's, and

(Testimony of Robert Forrester.)
the new work would be about 100—somewhere between 100 and 150 feet to the face of the entry, and 50 feet of Room No. 1, which is all that I could credit to Mr. King's operations, from my examination of the property.

Q. 31. What, if any, evidence was there of recent work from the breast of either of these openings back toward the mouth, other than what you have described?

A. They both showed evidence of having been worked very recently. They showed evidence of being in operation, although there was no man in the mine the day I was in there.

Q. 32. What is the distance from the mouth to the breast of the main level, when you were there?

A. Practically 600 feet, in a rough way.

Q. 33. And the length of Room No. 1, where it leaves the main level to the breast of that room?

A. Approximately 50 feet.

Q. 34. From a commercial standpoint, what if any value has any mined coal in that mine, as you examined it? A. None whatever.

Q. 35. Was your attention when you were there called to an opening known as the Old Room?

A. No, it was not. I was in every possible place it was possible to get into, from one end of the mine to the other.

[Certain Offers in Evidence.]

Mr. RICHARDS.—Plaintiffs now offer in evidence Plate No. IV, Map of the King Coal Mine, showing the underground workings, and it is agreed that a

(Testimony of Robert Forrester.)

copy may be substituted for the original offered.

(Said map was thereupon marked Plaintiffs' Exhibit "A," and a copy of the same is included in this transcript.)

Mr. CLARK.—I desire to have the same objection that I made to the other testimony go to the admissibility of this testimony, but no other objection.

Mr. RICHARDS.—Plaintiffs now offer Plate No. V and Plate No. VI, with the privilege of substituting a copy for the ones offered.

(Said plates were thereupon marked Plaintiffs' Exhibit "B" and Plaintiffs' Exhibit "C," and copies of the same are included in this transcript.

Mr. CLARK.—And the same objection is made by counsel as before.

Mr. RICHARDS.—And plaintiffs also offer Plate No. III.

(Said plate was thereupon marked Plaintiffs' Exhibit "D," and a copy of the same is included in this transcript.)

Mr. CLARK.—The same objection as before.

Mr. RICHARDS.—Q. 36. From whom did you get the facts in relation to when Mr. King procured this property, and when he had done the work thereon, and when he had mined the coal therefrom?

A. I got the date of his possession from the deeds, which he showed me—all of the deeds and abstract of title—showing the chain of title from its inception, with the United States patent through until title passed into the name of himself and wife, and such papers had the indorsement of the County Recorder

(Testimony of Robert Forrester.)
—the usual indorsement thereon—so that—well, they were the original papers of title.

(The last question was thereupon repeated by the Special Examiner, at the request of Mr. Richards.)

Cross-examination.

WITNESS.—And the other data I got from Mr. King himself.

(In answer to interrogatories propounded to him by Mr. D. Worth Clark, of counsel for the defendants, the witness deposes and says as follows:)

Q. 1. Mr. Forrester, are you acquainted with the plaintiffs, Mr. Lamborn and Mr. Richards?

A. Only having met Mr. King when I was up on the visit there.

Q. 2. I said Mr. Lamborn and Mr. Richards.

A. Oh! No, sir, any further than having met them once, I believe. Mr. Lamborn, I think I met him twice in Salt Lake City—at least, I took it to be Mr. Lamborn.

Q. 3. When was it you met Mr. Lamborn?

A. About two months ago, the first time, and about three or four weeks ago the last time, I believe.

Q. 4. You have testified here as to this mine, refreshing your recollection from a report that you have? A. Yes, sir.

Q. 5. With your permission I should like to examine the whole report?

A. With pleasure. (Handing same to Mr. Clark.)

Q. 6. You were out there to examine this property on the 10th day of May, 1909?

(Testimony of Robert Forrester.)

A. I believe that was the first day I arrived there.

Q. 7. And how long were you engaged in the examination of this particular property?

A. I was about a long half day in the mine and going up to it; I was all of a day in going all around it—at least, three sides of it.

Q. 8. You were about half a day in this mine?

A. Yes; and the other data I was getting after supper and during—

Q. 9. But understand me, Mr. Forrester: The personal examination that you made in the mine was made in half a day? A. Yes, sir.

Q. 10. Now, you refer in your testimony to the Pollard workings, do you? A. Yes, sir.

Q. 11. Now, isn't it a fact that when you were making this examination the Pollard workings were caved in to such an extent that it was impossible for you to make an examination of them?

A. It was caved in, but they were exposed along on the right hand side of those old rooms which are shown on the map.

Q. 12. Isn't it a fact that it was so caved in that the extent or character of the workings could not be ascertained by you, except in a general way?

A. That's all.

Q. 13. Then, in making this map, which shows the excavation and which you have marked as the Pollard old workings, how can you say that the old workings are as represented on this map?

A. I was given a map of the old workings.

Q. 14. Who gave you that map?

(Testimony of Robert Forrester.)

A. Mr. Miller.

Q. 15. And you assumed from that map that the Pollard old workings were as you have drawn them here on this map?

A. Yes, sir, because I found all the rest of the survey to check up.

Q. 16. In other words then, this map (so far as the old workings are concerned) was drawn from the map furnished you by Mr. Miller?

A. Certainly, yes, sir.

Q. 17. Then it was not drawn from information which you obtained by a personal inspection of this mine?

A. I said that I was furnished this map, and checked it up in different places, and found it essentially correct, and I accepted it as such for the other parts of it.

Q. 18. Well, let me understand you, Mr. Forrester: You were not able to get into these Pollard old workings at all, were you? A. No, sir.

Q. 19. Therefore it was impossible for you, from your own personal observation, to say what the character or extent of those workings are or were?

A. Only from the maps furnished me, sir.

Q. 20. Then, as a matter of fact, your entire information was obtained as to this particular part of this mine from the old map?

A. That is, the upper edge of the old workings, you mean?

Q. 21. Yes. A. Yes, sir.

Q. 22. Now, just what personal observations and

(Testimony of Robert Forrester.)

measurements did you make?

A. I commenced at the mouth of the mine, followed the coal in all its variability clear through from the main entry to its face, from the intersection of the main entry and Room No. 1, watched all its faces, and on the upper side of the main entry, wherever the coal was exposed it was examined by me, and the report is the findings.

Q. 23. Now, you say you made this examination at the request of Mr. McCutcheon? A. Yes, sir.

Q. 24. And in making this examination of the King mine, you made that in connection with the examination of several other mines in that vicinity?

A. There were no other mines in the vicinity.

Q. 25. Prospects, then? A. Properties.

Q. 26. Well, properties—and also some mines in Montana?

A. There was the Blair, a mine which I was passing. I had not any request from Mr. McCutcheon to pass upon it, but finding that there was no value in the Salmon City coals, I took the time to examine the Blair mine, and gave him a report upon that, too, as it was upon the line of his road.

Q. 27. Now, just what is the geological formation of what you call "bone coal"?

A. It can be any formation, from the earliest to the latest.

Q. 28. Well, of what is "bone coal" composed?

A. It is composed of carbonaceous material, mixed with a large quantity of foreign, non-carbonaceous material.

(Testimony of Robert Forrester.)

Q. 29. To what do you refer when you say "carbonaceous material"?

A. It is either fixed carbon, or a combination of fixed carbon and hydro-carbons combined.

Q. 30. Just what is the difference between "bone coal" and commercial coal?

A. The one has too much ash to render it valuable as a fuel; whereas the other is a good fuel.

Q. 31. What do you mean when you refer to the ash?

A. The uncombustible material—not coal.

Q. 32. Then it might be slate, or rock?

A. Well, slate and rock are sometimes—

Q. 33. —the same? A. —the same.

Q. 34. Well, it might be slate, or rock, or other material that would not burn?

A. Yes. Rock is slate, and slate is rock.

Q. 35. So the only difference between "bone coal" and commercial coal is that "bone coal" has more of this uncombustible material in it than commercial coal?

A. It has so much of it that the per cent available for use as a fuel—

Q. 36. Will you answer my question, Mr. Forrester? Is that the only difference between "bone coal" and commercial coal, that "bone coal" has more uncombustible material in it than commercial coal?

A. Yes, sir—to the extent of rendering it unfit for fuel.

Q. 37. Now, are you familiar with the coal mines

(Testimony of Robert Forrester.)

of Rock Springs? A. Yes, sir.

Q. 38. You have made an examination of those mines, and know the character of coal that is produced there? A. Yes, sir.

Q. 39. Now, will you say as a geologist of your experience that coal in the mine of Mr. King is of similar character as the coal in the mines at Rock Springs, with the exception that the coal mine about which you are testifying now has more uncombustible material in it than the Rock Springs coal?

A. The Rock Springs coal has 1.44 per cent ash. The average of all the carbonaceous layers in the King mine is 25.22 per cent ash.

Q. 40. Now, then, you have answered the question in your own way; now answer it in mine, and answer the question that I asked you. Will you read the question?

A. Well, I understand that I have answered it just as I understood you wished me to answer it.

Mr. CLARK.—Well, now, will you repeat the question to the witness?

(The Special Examiner thereupon repeated question No. 39.)

WITNESS.—No. The coal in the Rock Springs mines is a good, clean coal. The so-called coal in the King mine is not coal, if you mean a carbonaceous material that is combustible. If you separate the two, if it was possible, you would get the same result from the same quantity of fixed carbon and volatile matter, providing the King carbonaceous material carried as much free hydrogen as Rock Springs does.

(Testimony of Robert Forrester.)

Q. 41. You did not make an examination of the coal for the purpose of ascertaining whether it contained as much free hydrogen as the Rock Springs coal? A. Yes, I did.

Q. 42. Well, did it?

A. No, sir, it did not.

Q. 43. Well, what was the difference.

A. The difference is, the calorific power of the King coal is 3826 calories, and the Rock Springs coal is 6118 calories.

Q. 44. Where did you obtain the coal that you used as the basis of this estimation of the amount of ash that was contained in the King coal?

A. From samples taken by myself in the King mine.

Q. 45. Now, how much did you take out with you? How much coal did you take out with you—how many pounds?

A. The average sample in Room No. 1 would average about 2—between 2 and 3 pounds; the average sample of the top two layers in Room No. 1 was about the same amount; the average of the whole bed below the two top layers in Room 1 was about the same amount; and the average of the entire carbonaceous section, the upper face of the main entry, was about the same amount.

Q. 46. Where did you make this chemical analysis of it? A. In Salt Lake City.

Q. 47. And was anyone with you when you selected these samples?

A. Yes, sir—Mr. Miller.

(Testimony of Robert Forrester.)

Q. 48. Mr. Miller? A. Yes, sir.

Q. 49. He was the superintendent of the mine?

A. I understand so.

Q. 50. Now, where, with reference to the plat of the face of these workings that you have, did you take the first sample?

A. In the upper right-hand corner, at the face of Room No. 1.

Q. 51. Where did you take the other samples?

A. About the center of the face of the main entry.

Q. 52. At any other places?

A. No—those two places.

Q. 53. Then, you took the samples in the extreme end of the levels—of the lower level, and in Room No. 1? A. Yes, sir.

Q. 54. And those are the samples from which you have testified here as to the amount of ash there is in this coal? A. Yes, sir.

Q. 55. Now, referring to Plat V, for instance; that plate shows the face of the tunnel, does it?

A. The face of Room No. 1.

Q. 56. Is this a vertical section?

A. Yes, sir.

Q. 57. Now, just indicate on this vertical section at what places—from what places these samples were taken?

A. The sample was the average of each vein, or each layer of carbonaceous material, excluding the interstratified layers of shale or sandstone, from roof to floor. The average of the two top layers in Room No. 1 was the average of the 8-inch layer, separated

(Testimony of Robert Forrester.)
by one inch of soft shale and the 6-inch layer beneath it, excluding the shale parting. The average of the whole bed below the two top layers there—the average of all the coaly layers from below the two top layers, exposed in the entire section, excluding all the interstratified layers of shale or sandstone.

Q. 58. Did you have with you in the mine a scale or balance?

A. No, sir; I had no need for one.

Q. 59. Well, perhaps that is a matter of opinion. Now, did you take an equal amount from each of these stratas of coal?

A. No. I took and cleaned off the face of the coal for about six inches, and then took a channel of the same depth through each of the layers.

Q. 60. Did you measure the channel, to see if it was the same depth?

A. No; I didn't need to do it.

Q. 61. Why did you not need to do it?

A. Because I have eyes to see.

Q. 62. That is, you guessed at it, in other words?

A. Well, you can call it that way. It is not merely a guess. With a long practice in that sort of work one does not need to do these things, and never does it.

Q. 63. Well, perhaps I was a little unfortunate in the use of the word; but you used your own judgment as to whether or not you got an equal amount from each layer? A. Yes, sir.

Q. 64. And about how much did you take from each layer?

(Testimony of Robert Forrester.)

A. I couldn't tell you how much in weight. It was all put into one sack, and in all there was about two pounds and a half.

Q. 65. And taking the vertical section shown at Plate VI, you made the examination of the workings there in the same way that you did at Plate V?

A. Yes, with only this difference: that I took only one sample of the carbonaceous material at the face of the entry, whereas I took three samples in the face of Room No. 1.

Q. 66. You say you took only one sample at the face of the entry? A. Yes, sir.

Q. 67. From which layer did you take that?

A. I took that from all the layers of carbonaceous material, excluding all the interstratified bands of shale or sandstone.

Q. 68. Well, how did you do that?

A. Just in the same manner in which I took it in Room No. 1, which has just been explained.

Q. 69. Well, in order to take an average sample from all of the layers, it would be necessary for you to take more than one sample, wouldn't it?

A. No, sir.

Q. 70. Well, how did you do that, by taking only one sample?

A. By cutting a channel through each layer, of the same width throughout, mixing them and grinding them all up together, and quartering down to the amount necessary for a sample.

Q. 71. Well, did you cut the channel through the material that was not carbonaceous material just the same?

(Testimony of Robert Forrester.)

A. No, sir, I did not need to do that; I excluded all those.

Q. 72. Well, then, you really cut a piece out of each layer as you went down, didn't you?

A. Each layer of carbonaceous material, yes, sir; that is what I have said.

Q. 73. Well, you may have said so, but it was not clear to me. Now, you say that this coal is not commercial coal? A. Not of commercial value.

Q. 74. What do you mean by that?

A. That it has not heat enough in it to be valuable for commercial purposes and that can be sold in competition with coals of—with the ordinary coals.

Q. 75. That is, the coal as shown by the samples that you took?

A. By the samples of the coal and the evidence in the bed.

Q. 76. You examined this mine with the particular object in view of ascertaining whether or not it was a mine that could be successfully used in the operation of railroads, didn't you?

A. For the supply of fuel for the railroad and for the supply of the trade along the line of the railroad.

Q. 77. And in your report you called attention particularly to the fact that it could not be successfully used to burn in locomotive engines?

A. Yes, sir.

Q. 78. And you make no reference to the fact that it is not valuable for other purposes?

A. I said it was absolutely without value, which

(Testimony of Robert Forrester.)

covered everything that could come in.

Q. 79. When was it that you first knew that you would be used as a witness in this case?

A. The first time Mr. — Lamborn, isn't it?

Q. 80. Lamborn.

A. —Lamborn came, he said he might want me to give my testimony; but it was not finally closed until I received word from his attorney, asking me if I could come.

Q. 81. Was Mr. Lamborn present when you made this examination of this mine? A. No, sir.

Q. 82. Do you know whether he knew of the examination being made or not?

A. No, I don't.

Q. 83. Do you know how he knew that you had made an examination of it?

A. No; I don't know anything about that.

In answer to the redirect interrogatories propounded to him by Mr. J. H. Richards, of counsel for the plaintiffs, the witness deposes and says as follows:

Q. 1. Is this vein a horizontal or a dipping vein?

A. It is dipping at an angle of about 15 degrees. I could give it exactly if I had my working notes.

Q. 2. If you extended the workings of this property, as shown from your examination, what extent of coal is there possible, in your judgment?

A. Well, I have all along said there was no coal.

Q. 3. Well, what extent of vein matter would there be, to extend these workings in the way they are going?

(Testimony of Robert Forrester.)

A. Twenty-five feet farther would take them to the extreme boundary of the property on the south.

Q. 4. Then what is the condition of the property, as to whether or not it is substantially exhausted already or not?

A. Well, there is very little left, only to raise; to go to a depth the water would be a very serious problem, if not a prohibitive problem.

Q. 5. What is the difference in expense in mining the coal? What would be the expense, or what would the coal cost, in the condition in which you found it?

A. Well, picking out what carbonaceous material there was, it would cost not less than $6.00 per ton.

Q. 6. That would be due to the fact of the necessary sorting? A. Yes, sir.

Q. 7. What, if any, value has this coal as you found it, to use in the ordinary uses made of it other than in locomotives?

A. I don't think it has any value, because wood would be very much superior for fuel, even in that country.

In answer to the recross-interrogatories propounded to him by Mr. D. Worth Clark, of counsel for the plaintiffs, the witness deposes and says as follows:

Q. 1. Well, in estimating the cost of mining this coal, you estimated it in view of the condition of the mine as it was when you saw it?

A. As it would be if it was opened up as ordinary producing mines are. It could not be got below

(Testimony of Robert Forrester.)

$6.00 per ton for that production.

Q. 2. Well, in the condition that the veins were at the face of the tunnel, at the time you saw it?

A. Yes, sir. Of course, I am not saying anything as to the value of the material after it is gotten out. It has no value, even after it is sorted out.

Q. 3. Well, that is your opinion?

A. That is my opinion, sir.

Q. 4. You might change that opinion, if it should be shown that it had been sold?

A. No. I was shown that some had been sold, according to Mr. King; but I expressed to him my sympathy for the one who had to use it.

Q. 5. Still, if they were satisfied, that would not be any reason why other people should not be, would it?

A. Well, that is a matter entirely for their decision.

By agreement of counsel it was stipulated that the further taking of testimony should be continued from this time, and from December 14th, 1909, until Monday, December 20th, 1909, at ten o'clock A. M.

[PLAINTIFFS' EXHIBIT 'A']

S. E ¼ S W ¼ SEC 2

MAP OF THE

KING COAL MINE

SALMON CITY, LEMHI CO.

IDAHO.

SCALE OF FEET.

R. FORRESTER. GEOLOGIST

SALT LAKE CITY. MAY 1909.

SOUTH LINE OF SEC. 2 T 21 N R 21 E. OF BOISE MERIDIAN

SEC. 2 T. 21 N. R. 21 E. OF BOISE MERIDIAN

PLAINTIFFS EXHIBIT A.
Samuel Kramer,
Special Examiner.

[Examiner's Certificate to Testimony.]

United States of America, for the
District of Idaho,
Southern Division.

I, Daniel Hamer, Special Examiner, hereby certify that the above witness, Robert Forrester, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that his testimony was reduced to writing by myself; that said testimony was taken pursuant to an order of Court and stipulation of the respective parties, at the office of Clark & Budge, at Pocatello, Idaho, beginning on the 6th day of November, 1909; that the parties were present at the taking of said testimony by their respective counsel, as set forth; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand this 19th day of November, 1909.

DANIEL HAMER,
Special Examiner.

[Endorsed]: Filed March 1, 1910. A. L. Richardson, Clerk.

[Testimony (Continued).]

In the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

IN EQUITY—No. ——.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

By agreement of counsel heretofore made and entered into, it was stipulated that the further taking of testimony in this action should be and the same was continued from December 20th, 1909, until Monday, the 10th day of January, 1910, at ten o'clock A. M., at the office of Messrs. Clark & Budge, in Pocatello, Idaho, before Daniel Hamer, Special Examiner appointed by the Court to take the testimony on behalf of the respective parties hereto, under the 67th Rule of Equity, as amended, pursuant to stipulation of the respective parties hereto.

The further taking of testimony in this action was resumed on Monday, the 10th day of January, 1910, at ten o'clock A. M., at the office of Messrs. Clark & Budge, in Pocatello, Idaho, before Daniel

Hamer, Special Examiner, pursuant to stipulation of the respective parties hereto.

Present: J. H. RICHARDS, Esq., of Counsel for Plaintiffs, and

Messrs. CLARK & BUDGE, Counsel for the Defendants.

The following proceedings were thereupon had:

[Testimony of John G. Richards, for Plaintiffs.]

JOHN G. RICHARDS, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. RICHARDS.)

Q. You may state your name.

A. John G. Richards.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. Where do you reside, Mr. Richards?

A. Higgins, Texas.

Q. How long have you lived there?

A. Well, for more than two years.

Q. You are a citizen of the State of Texas?

A. Yes, sir.

Q. Are you acquainted with Mr. King, one of the defendants in this case? A. I am.

Q. How long have you known him?

A. I believe I first met Mr. King the spring of 1906.

Q. Where did you meet him?

A. At his place of business.

Q. Where is that? A. Salmon City, Idaho.

(Testimony of John G. Richards.)

Q. What was his business at that time?

A. Banking.

Q. At what place?

A. The First National Bank, in Salmon.

Q. Have you known him intimately since that time? A. Yes, sir.

Q. How long did you remain in Salmon City at the time you first met Mr. King?

A. Well, I had Salmon City as my chief stopping-place while I was in the State. I left there about the first of January the following year.

Q. Do you know what, if any, official position Mr. King occupied in reference to the bank you spoke of? A. I believe as president.

Q. How often did you meet Mr. King while you were in Salmon at that time?

A. Well,—

Q. In a general way?

A. Daily, when I was in Salmon.

Q. Where would you meet him?

A. At his bank.

Q. How intimately were you acquainted with him and associated with him, in social and other ways, at that time?

A. Well, I regarded the bank as my chief loafing-place.

Q. Did you have many conferences with him, in a general way, during that time? A. Daily.

Q. What seemed to be the standing of Mr. King in that community?

A. A first-class citizen in every respect.

(Testimony of John G. Richards.)

Q. How long did that character of acquaintance, or intimate relation, as you have given it, continue between you and Mr. King?

A. Well, it continued up to January, of 1909.

Q. Did you have any occasion to do business at his bank?

A. I did all my banking business at his bank.

Q. Can you state whether or not your relations with him during those times were intimate, or otherwise?

A. Well, I should say most friendly. I considered Mr. King a confidential friend, talked intimately in regard to my own business matters, and he talked freely about some of his business affairs.

Q. What effect did that relation with him that you have described have upon your confidence or lack of confidence in Mr. King?

A. Well, I only had the very greatest of confidence in Mr. King, both as a gentleman and as to his business ability.

Q. When did you leave Salmon, after being there that first time?

A. About the first of January, 1907.

Q. Did you become at all acquainted with the coal lands in controversy at the time you were there?

A. The first year?

Q. The first year—yes?

A. No; I only knew the coal mines as I would occasionally see a load of coal which Mr. Pollard (who then owned the coal mine) might deliver in town.

(Testimony of John G. Richards.)

Q. In what direction is this coal property situated from the town of Salmon?

A. Why, in a southwesterly direction.

Q. How far from the bank where Mr. King did business, about?

A. Oh, it is—I don't think it is quite two miles —about two miles.

Q. Connected by a wagon road, or trail, or how?

A. By a good wagon road.

Q. When did you first visit the mining property?

A. I visited it in August, of 1907—the latter part of August,—I might have been there the first day or two in September—but the latter part of August.

Q. What was the occasion of your going to visit the property at that time?

A. Well, I was in Salmon for a few days, and Mr. King had previously informed me by letter that he had made what he considered an excellent investment in a coal mine, and at the time of my visit into Salmon he desired that I go up and look the proposition over with him and see what I thought of it.

Q. Did you go? A. I did.

Q. Who went with you? A. Mr. King.

Q. Describe just what you saw there in relation to this coal property, when you and Mr. King visited it?

A. Well, we went in what is now known as the old Pollard workings, entered through a tunnel which is run on the strike of the vein,—

Q. How far did that tunnel run, as you saw it at that time, on the strike of the vein?

(Testimony of John G. Richards.)

A. Well, we didn't go a great ways until the tunnel inclined upward at a very steep grade for moving cars, even empty cars, and then it opened out into rooms—that is, spaces; not exactly rooms, but spaces from which the coal had been mined—and I should say that we first went up about—oh, 200 feet, or 250 feet, possibly.

Q. From the mouth of the tunnel?

A. Yes.

Q. Give a description of the vein, as nearly as you can, as you saw it at that time?

A. Well, at the opening the vein is in broken layers, or ribs of slate, clay, and disintegrated material; and as we advanced it became more compact, or not quite so broken up, and the carbonaceous material began to show up more, and I think we got into where the—at the time I visited the mine Mr. Pollard was in the room; where he was, some distance ahead, was quite a breast of carbonaceous material —he called it coal.

Q. Just describe the appearance of that breast, as near as you can.

A. Well, we went from the main entry up an incline to Mr. Pollard, and where he was working and all about him was this breast of, I should say five or six feet, and—

Q. You mean five to six feet thick, between walls?

A. Well, to the break; they were breaking five to six feet.

Q. Just give a description of the appearance then

(Testimony of John G. Richards.)
of that breast that they were breaking?

A. Well, I don't remember much about the specific appearance, any more than that the coal, by the oil-lamps that they were using, seemed to be solid between those walls.

Q. What do you mean by "walls"?

A. Well, the roof and the floor of the break—of the opening.

Q. Was it in layers, or all in one solid mass?

A. Well, it showed layers.

Q. Layers of what, apparently?

A. Layers of carbonaceous material—coal and clay, sandy streaks—bone.

Q. Give us some general idea as to the width of those layers?

A. Well, the carbonaceous material was, I believe,—the thickest I saw was about—oh, a foot; it might have been a foot and a half; that would come out as a portion of a layer. But that wasn't material that—it wasn't good burning material; it was good after being sorted; and the other layers were bone—what we call "bone coal," and sand, and clay.

Q. What do you mean or understand by "bone coal"?

A. Well, it is a coal mixed with ash material—sand—clay.

Q. From the appearance of that vein, as you saw it that day, did it appear to be permanent, or otherwise?

A. Yes; it appeared to me that it was very permanent.

(Testimony of John G. Richards.)

Q. What, if any conversation did you have with Mr. King that day, in relation to the coal property and its development?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—We discussed the permanency of the vein; and I remember that I was very strongly impressed that I thought it was permanent.

Mr. CLARK.—Well, I object to the witness answering this question in his own way.

Mr. RICHARDS.—Well, what I am asking you, Mr. Richards, is the conversation between you and Mr. King that day?

A. Well, we discussed the permanency of the vein, and he desired to know if I didn't think it was a good investment, and what I thought might be the development of the mine—what might be done with it in the way of selling it; if I didn't think it would sell well. And to this I answered that by proper development it might show up considerable of a proposition; and he wished to know if I thought I would be able to sell it, and to which I answered, if this development was carried on, and it continued to increase as it increased from the mouth of the tunnel into the present workings, that it certainly would sell, and that if it increased in value, and only held its quantity, that it would sell easily and would be a great proposition, if from no other than the local standpoint.

Q. About how long did you remain around Salmon at that time?

(Testimony of John G. Richards.)

A. Well, I was only there three or four days, I believe.

Q. Where did you go from there?

A. From there I went to Denver.

Q. And did you receive communications from time to time from Mr. King, while in Denver or in that vicinity?

A. Yes, sir; I received communications almost each month.

Q. In relation to the coal property?

A. The coal property was usually spoken of in these communications.

Q. What other place did you stop at near Denver? A. Golden.

Q. What was your purpose in going to Golden?

A. I was taking work in chemistry and geology at the School of Mines.

Q. Did you write Mr. King letters while you were there? A. Yes, sir.

Mr. RICHARDS.—Have you those letters, Mr. Clark?

Mr. CLARK.—Well, Judge, I don't know. If you can refer to any specific letter—

Mr. RICHARDS.—Well, I can't give the dates. If you wish to produce them at this time, we would be glad to have you do so; but if not, all right.

Mr. CLARK.—Well, I will say to you frankly, we have quite a number of letters.

Mr. RICHARDS.—I can't tell the dates; but they were written from Golden.

(Testimony of John G. Richards.)

Mr. CLARK.—I will look them over at noon, Judge.

Mr. RICHARDS.—But that is as near as I can define the time.

Mr. CLARK.—Yes; I think we have many of the letters he wrote.

Mr. RICHARDS.—Q. You say that while you were there you received letters from Mr. King?

A. Yes, sir.

Q. Paper shown witness. You may state what that is, Mr. Richards?

A. That is a letter from Mr. King.

Q. Just give the date.

A. Dated October 30th, 1907.

Q. To whom addressed?

A. "Friend Dick."

Q. To whom had that reference?

A. Myself.

Q. By whom is the letter signed?

A. H. G. King.

Q. Are you acquainted with Mr. King's handwriting? A. Yes, sir.

Q. Is that his signature? A. It is.

(Mr. Richards submitted said letter to Mr. Clark.)

Mr. RICHARDS.—I think it might be well—I will not offer the whole letter, but simply those portions which relate to the coal property, so that it will not encumber the record.

(Mr. Clark examined said letter.)

Mr. CLARK.—Did you offer this letter in evidence?

(Testimony of John G. Richards.)

Mr. RICHARDS.—I have not. I just wanted you to see it, so that you could frame your objection. Here is one, also, which I will offer later.

(Mr. Richards submitted said last mentioned letter to Mr. Clark, who examined the same.)

Mr. RICHARDS.—We now offer in evidence the letter just described by the witness, and particularly that portion reading as follows:

"The coal business is a bonanza and I am more than satisfied that the thing to do is to hold it for a while"—

Mr. RICHARDS.—I don't know what that word is—maybe you can tell me?

WITNESS.—"and"

Mr. RICHARDS.— —"and December 1st I will have deed to the whole thing then there will be no hurry in handling it as I feel sure that a R R would make it worth $250,000.00 and it cannot depreciate as a local proposition without a R R. I have delivered since September 1st in town 450,000 lbs. of coal and no cold weather yet. I have pushed the tunnel 100 feet further and the coal is 25% better, and holds its thickness.

"You can send me the $1,000.00 & I will send you note for same, this will help out as I had nearly all the balance, and when you think the time is ripe we can talk up a deal and I will have the mine in such shape as to show it to best advantage as I am not stoping but getting plenty of coal by pushing the tunnel which is only developing the mine. I could have sold the mine the other day for $50,000 but I am

(Testimony of John G. Richards.)

sure it will be just as easy in the Spring to get $100,000, as it will now pay good interest on that amount. I am so anxious to get it in my name then we will be in proper shape to do what may be best."

Mr. RICHARDS.—I ask that this be marked Plaintiffs' Exhibit "E."

(Said letter was marked as requested.)

Mr. CLARK.—The letter as a whole is objected to as incompetent and immaterial, and the particular portions read by Judge Richards into the record are also objected to as incompetent and immaterial.

Mr. RICHARDS.—Q. (Paper shown witness.) You may state what that is.

A. A letter from Mr. King.

Q. Give the date? A. December 19th, 1907.

Q. To whom addressed? A. "Friend Dick."

Q. To whom does that refer? A. Myself.

Q. By whom signed? A. H. G. King.

Q. Is that Mr. King's signature?

A. It is.

Mr. RICHARDS.—We offer in evidence the letter just described by the witness, and particularly that portion which reads as follows:

"Say Dick the coal mine is a Trump have delivered over 500 tons already at 6.00 and Miller is opening her up in fine shape, you would not know it now—have a Big Tunnel use a Mule on the cars 3 ft. Track 16 lb. rails Large Blacksmith Shop, office, new—"

Mr. RICHARDS.—What are those two words?

WITNESS.——"new sheets and screens."

Mr. RICHARDS.——"new sheets and screens,

(Testimony of John G. Richards.)
our own way scales and everything up to date the outlay cost about 2000.00 but it was money well spent. McQuarrie thinks it worth ¼ Million."

Mr. H. G. KING.—Judge, that is W. F. McQuarrie—that McQuarrie thinks it is—"McQuarrie thinks it is worth ¼ Million, and the people here seem to think the same thing now. The R R surveyors are cross-sectioning."

Mr. RICHARDS.—I would ask that this be marked Plaintiffs' Exhibit "F."

(Said letter was marked as requested.)

Mr. CLARK.—The letter as a whole is objected to as incompetent and immaterial, and the particular parts read into the record are also objected to as incompetent and immaterial, and not within the issues in this case, and not tending to prove any of the issues.

Mr. RICHARDS.—Q. When did you again meet Mr. King? A. About the last of June, 1908.

Q. Where did you meet him?

A. In Salmon City. I beg pardon, Judge—this was after my being in Golden?

Q. Yes. What, if anything, was then said between you and Mr. King in relation to this coal property?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—Well, I had come from New York to close the deal for the coal property.

Mr. RICHARDS.—Q. Where did you go from Colorada, before coming to Salmon?

(Testimony of John G. Richards.)

A. I had gone to my ranch in Texas, near Higgins.

Q. And from there where did you go?

A. I left the ranch about the latter part of—

Q. Just a moment, just to save time. What I want to get at is, you said you had been to New York. I want to know if you went from Colorado to New York—just to save a multitude of questions.

A. No; I went to the ranch, and then to Cincinnati.

Q. While you were in Cincinnati did you receive any communication from Mr. King?

A. Yes, I did.

Q. In what form was that?

A. This letter was not addressed to Cincinnati, but to a suburban town of Cincinnati, if that makes any difference.

Q. It was in the form of a letter, was it?

A. In the form of a letter.

Q. Have you that letter?

A. No, I haven't.

Q. What became of it?

A. It was destroyed with the—or, rather, disappeared with other letters and clothing in a grip which was stolen from me.

Q. Have you made any effort to recover that grip with these letters? A. I did all I could.

Q. Have you been able to get any trace of it, or of these letters? A. No, sir.

Q. This letter you mention was in that grip when it was lost? A. Yes, sir.

Q. Is it possible for you to procure that letter, or

(Testimony of John G. Richards.)

a copy of it? A. No, sir.

Q. You may state what that letter contained, in reference to this coal property?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—It was in answer to a letter I had written him, asking Mr. King to specify the improvements he had made at the mine and the condition it showed to be in at the time he wrote this.

Mr. RICHARDS.—Mr. Clark, can you produce the letter?

Mr. CLARK.—Q. Where did you write that letter from, Mr. Richards?

A. I think it was Bethel, Ohio, although I might have written it at the hotel in Cincinnati; and I had also written a letter previous to that.

Mr. RICHARDS.—Have you any such letter, Mr. Clark?

Mr. CLARK.—I don't find any here, Judge.

WITNESS.—There was also one written from Winfield, Kansas.

Mr. CLARK.—I have one from Winfield, Kansas.

Mr. RICHARDS.—Q. Mr. Richards, is the letter you say was lost the reply to the one you wrote from Winfield, Kansas?

A. Well, it was in reply to the one I had written for this information.

Q. You are not positive just from what point you wrote that to Mr. King?

A. Well, I think I wrote one from Winfield, and I also might have written one from Ohio.

(Testimony of John G. Richards.)

Q. Well, you may state in detail what that letter contained, as near as you can recall it?

A. That the tunnel was looking up in good shape; that is, the coal breast was continuous, and a better grade of coal, and they had made surface improvements, in the way of bends, screens, scales, office, and had put in tracks, and had supplied about 2,000 tons of coal.

Q. To whom?

A. To the people in Salmon.

Q. Is that all as you recall that the letter stated about the coal? A. That is all I recall now.

Q. Was anything stated by Mr. King to you at these times as to what he considered the property worth, or what he would sell it for?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—He had made the assertion that he would have to get $50,000.00 out of the proposition, but that he expected it would be worth $100,000.00.

Q. Now, when and where did you have a conversation with Mr. King in reference to the value of this property, or what he would be willing to dispose of it for?

A. We discussed the value in making a deal on the proposition, on the way back to Salmon from the mine.

Q. At the time you have mentioned heretofore?

A. The time that I was there in 1907.

Q. Now, what did he say in relation to the value, and the price for which he would be willing to dis-

pose of it?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—Well, he wanted to know for how much I could sell it, and I told him on a proposition like that, that it would depend upon what amount it would pay interest on; that he could figure on a six per cent basis, and probably sell it for that amount, and even more.

Mr. RICHARDS.—Q. Now, just give us all that was said, as near as you can recall it?

A. He wanted to know what my charges would be for making a sale of that mine, and I told him that I would handle it for $25,000.00, and after—about the next day or two, or before I left town for Denver, he was discussing the success of his bank investment there, and said that it would pay him about twenty per cent on the investment; and we discussed then the money that he might get from this sale of the coal mine, putting it in the banking channels, and possibly real estate transactions, that he could make more out of it than if he held the mine; and finally he said that if I could turn the deal for $75,000.00 that he would carry my portion of the commission.

Q. When you speak of the charge that you said you would make of $25,000.00, was that the commission to which you refer? A. Yes, sir.

Q. Well, what if anything was determined upon at that time?

A. Well, about the way we left the proposition was, that development was to be carried on in the

(Testimony of John G. Richards.)
proper manner, and if the mine showed an increase and the people showed an inclination to use the product, that I was to have the business of selling it.

Q. Did you agree to undertake to dispose of the property at that time or not?

Mr. CLARK.—That is objected to as incompetent and immaterial, and not the best evidence.

WITNESS.—Yes; I agreed to this extent; that if the development increased and the property was making good, that I would like to dispose of it, and Mr. King was willing that I should dispose of it. It was understood that if the property was sold or in the market that I was to have the selling of it.

Mr. RICHARDS.—Q. And was any price fixed between you at that time?

A. Not specifically; no.

Q. Where did you go from Cincinnati?

A. I went to Washington.

Q. Did you go to New York?

A. I went to New York from Washington.

Q. Did you meet the plaintiff (Mr. Lamborn) there at that time? A. Yes, sir.

Q. Did you show him the letter that you have described as having been lost, and the contents of which you have testified to? A. Yes, sir.

Mr. CLARK.—That is objected to as incompetent and immaterial, and for the reason that the answer was given before I had an opportunity—

Mr. RICHARDS.—Well, he may place it that way—

(Testimony of John G. Richards.)

Mr. CLARK.—I desire to move to strike out the answer.

Mr. RICHARDS.—Yes; the answer is withdrawn.

Q. Now, you may answer whether you showed Mr. Lamborn the letter or not? A. I did.

Q. Did you have any communication from Mr. King while you were there in New York, in reference to this coal property? A. Yes.

Q. In what form was that?

A. A telegram.

Q. Have you that telegram?

A. I have a copy of it.

Q. Have you the original? A. No, sir.

Q. What became of the original?

A. It was with the letter that was taken when the grip was stolen.

Q. What, if any, effort have you made to recover that telegram?

A. The same that I did for the letter and the grip.

Q. You have been unable to get any trace of it?

A. Yes, sir.

Q. Are you able to produce it now, at this time?

A. I am not.

Q. Or a copy of it? A. I am not.

Mr. RICHARDS.—(To Mr. CLARK.) I might show you a copy; otherwise, you might be willing to state that it is a copy.

(Mr. Richards submitted copy of telegram to Messrs. Clark & Budge, who examined the same.)

Mr. CLARK.—Well, Judge, I guess you had better go ahead and prove it.

(Testimony of John G. Richards.)

Mr. RICHARDS.—Q. You may state what that telegram contained.

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—It contained the tonnage that Mr. King had supplied at the time of his answer; that is, and from the time he had taken possession of the property.

Q. (By Mr. RICHARDS.) Well, just give us the language?

A. 2,300 tons this year—it showed that increase.

Q. What was the occasion of your securing that telegram?

A. It was in answer to one that I had sent to Mr. King, asking for this information.

Q. Did you show that telegram to the plaintiff, Mr. Lamborn?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—The one I sent?

Mr. RICHARDS.—Q. The one you received?

A. The one I received—yes, sir.

Q. Did you have a conference with Mr. Lamborn in relation to his joining you in the purchase of this coal property, while you were there in New York?

A. Yes, sir.

Q. What reasons had you to show him the letter that you have described and the telegram you have described?

Mr. CLARK.—That is objected to as incompetent and immaterial.

(Testimony of John G. Richards.)

WITNESS.—At his request.

Mr. RICHARDS.—Q. Well, why should he request it?

A. We had been discussing this proposition; he wanted to know why I was in New York, and I told him I was there in the interests of selling a coal property in Idaho.

Q. Did you have any definite arrangement made with Mr. King in reference to the sale of this property? A. I did.

Q. Was that in writing? A. Yes, sir.

Q. (Paper shown witness.) You may state generally what that is?

A. This is an agreement I sent to Mr. King for his signature.

Q. Did he sign it? A. He did.

(Mr. Richards submitted said document to Messrs. Clark & Budge, who examined the same.)

Mr. CLARK.—I will just enter the general objection that this is incompetent and immaterial. I guess you haven't offered it yet, though, have you?

Mr. RICHARDS.—The paper just described by the witness we now offer in evidence as Plaintiffs' Exhibit "G."

Mr. CLARK.—That is objected to as incompetent and immaterial.

Mr. RICHARDS.—About what time were you in New York when you say you met Mr. Lamborn in reference to this coal property?

A. The first part of June.

Q. Of what year? A. 1908.

(Testimony of John G. Richards.)

Q. Was or was not Mr. Lamborn aware of the fact that you had this agreement, marked Exhibit "G"?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—Yes, sir.

Mr. RICHARDS.—Q. What was the occasion of your wiring, as you say, to Mr. King, to send you the telegram of which you have just given the contents?

A. I sent this telegram asking for the tonnage at the request of Mr. Lamborn.

Q. Why should he want to have such information as that, if you know?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—Because he was considering becoming a partner with me in the taking over of this property.

Mr. RICHARDS.—Q. Did you subsequently, or shortly after that time, go to Salmon?

A. Yes, sir.

Q. For what purpose did you go to Salmon?

A. I went to Salmon to examine the property, if possible, and to confer further with Mr. King.

Q. In reference to what?

A. To the sale of this property.

Q. Well, why should you confer with him about the sale of the property? What did you confer with him about?

A. Well, the deal had not been specifically agreed upon, and I was then expecting to become interested

in it myself, and I wished to get as good a deal as I thought Mr. King would give us.

Q. Well, what information did you get when you went there, in reference to the tonnage, etc.?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That there was more than 2,300 tons supplied to the people of Salmon.

Mr. RICHARDS.—Q. From whom did you get that information? A. Mr. King.

Q. What, if any, further information did he give you in reference to the property?

A. That he had supplied more than 300 tons to the Copper Queen mine, in addition to the amount supplied to the people of Salmon.

Q. Did you visit the mine at that time?

A. I did.

Q. Just give a description of what you saw there at that time?

A. Well, I saw the new surface improvements which Mr. King had made, and—do you want me to detail this?

Q. Oh, just in a general way, what changes had taken place.

A. Well, there was ore-bins, screens, tracks, scales.

Q. What, if any, change had taken place in the development work, if any?

A. A new entry had been started.

Q. How far in was that entry?

A. Why, about 200 feet; I believe not quite 200.

(Testimony of John G. Richards.)

Q. From where did it start, relative to the former entry or tunnel you have described?

A. Well, about the same place; the side of one entry made the side of the other entry.

Q. How was it run, in reference to the same manner the other one was run?

A. Well, it was run on a better plan; it had a regular grade, about sufficient to carry the water, and it had rails, good ties, and was well timbered up—done in a good, business-like manner.

Q. Did Mr. Lamborn go to Salmon to visit this property? A. Yes, sir.

Q. How did he happen to go there?

A. At my request.

Q. From where? A. New York City.

Q. Did you have any communication with him after you arrived at Salmon, before he reached there, or before he left for Salmon?

A. While he was at New York?

Q. Yes, sir. A. Frequent communications.

Q. What, if any, instructions did you give him relative to coming? A. I asked him to come.

Q. Did he come? A. He did.

Q. About what time did he arrive at Salmon?

A. He arrived on Sunday—the last Sunday in July.

Q. What year? A. 1908.

Q. About what time in the day?

A. Oh, I believe it was about noon.

Q. How long did he remain there?

A. I believe he left the following Wednesday evening.

(Testimony of John G. Richards.)

Q. What, if any, conference had he with Mr. King, in your presence, while he was there?

A. Well, we had daily conferences. The first was at the mine on Sunday afternoon.

Q. The day of his arrival?

A. The day of his arrival; but there was no business talked—just a general conversation.

Q. Just visited the mine? A. Yes, sir.

Q. Did Mr. Lamborn go into the mine on that date? A. Yes, sir.

Q. About how far in? A. About 200 feet.

Q. And you accompanied him?

A. Yes, sir.

Q. What was the condition of the mine at that time, relative to going through all of its workings?

A. Well, we couldn't leave the main entry—the new entry.

Q. Why?

A. Well, on account of the bad air. We did get in further than the breast of the new entry, but it was under difficult circumstances, and the air was bad; it wouldn't support the lights.

Q. What do you mean by "it wouldn't support the lights"? A. Well, the lights would go out.

Q. Then, for the reasons given, you were unable to go into all the workings of the property at that time?

A. Yes. We tried to blow air in, but that was not effectual.

Q. What conference did Mr. Lamborn have with Mr. King, in your presence, while he was there, in

(Testimony of John G. Richards.)

relation to this property?

A. Well, we talked the matter over some on Monday evening.

Q. Well, tell what was said, as near as you can recall it?

A. Well, the particular point that we were after at that time was to know the tonnage, on which we might base the rate of interest the investment would make on it.

Q. What was said by Mr. King to Mr. Lamborn, in your presence, in reference to the tonnage, at that time?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—He said that it was 2,300 tons and more, in addition to which he spoke of the 300 tons at the Copper Queen mine.

Mr. RICHARDS.—Q. Did he state at what price that coal had been sold?

A. The local people had paid $6.00 a ton for it.

Q. Delivered? A. Delivered.

Q. Was anything said in reference to the cost of the production of that coal?

A. He said he didn't know just what he had made on the coal, but that it could be mined at about $3.00 per ton.

Q. And delivered? A. And delivered.

Q. Was anything said about what his own profit would be in the production of that coal?

A. That it would be $3.00 per ton.

Q. What was said, if anything, in reference to the

(Testimony of John G. Richards.)
price of the property?

A. The price of the property we had already discussed at $80,000.

Q. What, if anything, was said about it being a good or safe investment?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That it was absolutely safe, based upon the tonnage supplied; the increasing demand of the trade.

Mr. RICHARDS.—Q. Upon what rate of interest?

Mr. CLARK.—That is objected to as incompetent and immaterial.

Mr. RICHARDS.—Q. Did he state that it was a safe investment?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—We figured on a basis of six per cent.

Mr. RICHARDS.—Q. When you say you figured, who stated that?

A. Well, it was common conversation.

Q. By whom? A. By Mr. King.

Q. How far in did he say he had run any of these workings, if he made any such statement?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—He gave us the distance of 756 feet from the portal of the tunnel.

Mr. RICHARDS.—Q. What, if anything, was

(Testimony of John G. Richards.)
said by Mr. King as to the breast of that level, or run?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That there was more than five feet of clean coal, that did not have to be sorted.

Mr. RICHARDS.—Q. What did you find about this being true or not when you went up to see it?

A. We were unable to examine that feature.

Q. Why?

A. Because of the bad air, and caves.

Q. Did Mr. King go with you to the mine while Mr. Lamborn was there?

A. He was in there once, I believe.

Q. What was the result of that conference there between Mr. Lamborn and yourself on the one side, and Mr. King on the other, in reference to the sale of that property?

A. While we were at the mine?

Q. While you were in Salmon City?

A. Well, we were resting on the belief—

Q. I am asking you what the result was?

A. The result was the closing of the deal.

Q. Was that deal in writing? A. Yes, sir.

Q. (Paper shown witness.) You may state what that is.

A. This is the contract entered into by Mr. Lamborn and myself and Mr. King.

Q. And what is the date of it?

A. The 30th day of July, 1908.

Q. By whom is it signed?

(Testimony of John G. Richards.)

A. By Harry G. King, Maria J. King, Arthur H. Lamborn and J. G. Richards.

Q. Is this the same instrument that you set up in your complaint? A. It is.

Mr. RICHARDS.—I offer this instrument in evidence, and ask that it be marked Plaintiffs' Exhibit "H."

(Said document was marked as requested, and the same is in the words and figures following, to wit:)

[Plaintiffs' Exhibit "H."]

THIS AGREEMENT MADE THIS 30th day of July, 1908, by and between Harry G. King and Maria J. King, his wife, of Salmon City, Lemhi County, Idaho, the parties of the first part, and Arthur H. Lamborn of Montclair, New Jersey, and John G. Richards, of Higgins, Lipscomb County, Texas, the parties of the second part;

Witnesseth:

That for and in consideration of the mutual covenants and agreements hereinafter contained, as well as the payments of money hereinafter provided for, the said parties of the first part hereby agree to convey by warranty deed to "The Idaho Coal and Land Company, Limited," a corporation hereinafter described, to be organized, the following described lands situated in the County of Lemhi, State of Idaho, to wit: The South-west quarter and the South-east quarter of Section One, and the South-east quarter of the South-west quarter, and the South half of the South-east quarter, and the North-east quarter of the South-east quarter of Section Two, all in Town-

ship 21 North of Range 21 East of the Boise Meridian, together with the minerals and mineral veins therein contained, and all ditches and water rights and other improvements connected therewith. The said deed shall convey the said property free and clear of all encumbrances and the said parties of the first part will furnish with the said deed an abstract of the title to the said land, showing the same to be free and clear therefrom. The said deed shall be executed on or before the first day of January, 1909, and shall be placed in escrow with a depository hereafter to be agreed upon by the said parties, to be delivered to the said corporation upon compliance with the terms and conditions of this agreement.

In consideration whereof the said parties of the second part agree to pay to the said Harry G. King the sum of seven thousand five hundred dollars ($7,500) cash in hand, the receipt whereof is hereby acknowledged, and the further sum of twenty-two thousand five hundred dollars ($22,500) payable on or before the first day of January, 1909; the said Arthur H. Lamborn will also, on or before the first day of January, 1909, execute and deliver to the said Harry G. King his four promissory notes for the sum of twenty-five hundred dollars ($2,500) each, or ten thousand dollars ($10,000) in all, payable the first note on the first day of January, 1910, the second on the first day of January, 1911, the third on the first day of January, 1812, and the fourth and last on the first day of January, 1913. It is also understood and agreed that the said parties hereto, who shall organize and control the said corporation, will

cause, as hereinafter provided, the bonds of the said corporation, secured by first mortgage upon the said property, to be executed and delivered to the said Harry G. King, in the further sum of forty thousand dollars ($40,000) making the total amount of money, notes and bonds to be paid for the said property, to be equal to eighty thousand dollars ($80,000). The said notes of Arthur H. Lamborn shall bear interest at the rate of six per cent per annum, payable annually.

The said Harry G. King and the said parties of the second part hereby mutually agree that they will complete the organization of the said corporation as soon as practicable, and not later than the first day of January, 1909. The said corporation shall be organized for the sum of two hundred thousand dollars ($200,000) divided into two thousand shares of the par value of one hundred dollars each; that the said stock shall be subscribed for by the said parties as follows: the said Harry G. King, five hundred shares; the said John G. Richards, five hundred shares, and the said Arthur H. Lamborn, one thousand shares, and upon the completion of the organization of the said corporation, the said corporation shall, in part payment for the transfer to it of the said property, execute to the said parties its bonds, secured by first mortgage upon the said property, in the sum of eighty thousand dollars ($80,000) which shall be issued to the said Harry G. King as aforesaid, in the sum of forty thousand dollars ($40,000) to the said John G. Richards in the sum of seven thousand five hundred dollars ($7,500) and to

the said Arthur H. Lamborn in the sum of thirty-two thousand five hundred dollars ($32,500) the said bonds to draw interest at the rate of six per cent per annum, payable semi-annually, and to run for the term of twenty years.

The said Harry G. King agrees to attend personally to the details of the completion of the organization of the said corporation, which shall be completed as aforesaid, on or before the first day of January, 1909, and in case the said parties of the second part shall fail to pay to the said Harry G. King, on or before the first day of January, 1909, the said sum of twenty-two thousand five hundred dollars ($22,500) then this agreement shall become null and void, and the said sum of seven thousand five hundred dollars ($7,500) paid at the date hereof, shall become forfeited to the said parties of the first part.

It is mutually understood and agreed by the parties hereto that this agreement shall run to and bind the heirs, executors and administrators of each and every of the said parties; and it is further mutually understood and agreed that in case of the death of either of the said parties of the second part, if the survivor shall be unable, in a financial way, to carry out and complete this agreement on behalf of such deceased party, such survivor shall be permitted to carry out and complete the terms hereof for his proportionate interest in the said property as fixed and determined by the terms and conditions of this agreement.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals this 30th day of July, 1908.

HARRY G. KING. (L. S.)
MARIA J. KING. (L. S.)
ARTHUR H. LAMBORN. (L. S.)
J. G. RICHARDS. (L. S.)

State of Idaho,
County of Lemhi,—ss.

On this 30th day of July, 1908, before me the subscriber, a Notary Public in and for the County of Lemhi, State of Idaho, personally appeared Harry G. King, Maria J. King, Arthur H. Lamborn and John G. Richards, known to me to be the persons whose names are subscribed to the within instrument, and they each acknowledged to me that they executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] JOHN C. SINCLAIR,
Notary Public in and for Lemhi County, Idaho.
My commission expires Feby. 1st, 1911.

Mr. RICHARDS.—Q. What, if anything, induced you to enter into that contract?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—We were assured of six per cent. interest on our investment.

Mr. RICHARDS.—Q. By whom?

A. By Mr. King.

(Testimony of John G. Richards.)

Q. Based upon what?

A. The tonnage he had supplied for the time he had been running the property.

Q. Did anything about the cost of production enter into it? A. Yes, sir.

Q. Just tell us.

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That it could be supplied at a cost of $3.00 per ton.

Q. (By Mr. RICHARDS.) Knowing Mr. King as you state you have, what reliance did you place upon these statements of his?

A. Absolute confidence. I felt I knew them to be true.

Q. What, if anything, did he state to you while you were there with reference to the new breast that you say you could not see being the same or similar to the lower layer of the other breast which you had seen?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That in the breast of the new entry there was an exposure of more than ten feet; this exposure was divided by a seam of clay.

Mr. RICHARDS.—Q. What do you mean by the "new entry"?

A. The one that they were working for a permanent entry. This clay seam was—oh, eight inches to a foot in thickness, and divided the breast into about equal proportions, although there was probably a

greater amount above than there was below. The upper portion, the breast of the new entry, was worthless—absolutely worthless. It was sand and clay and bone, and there was no attempt to sort but very little if any material from that for the trade. Below this clayey strata was a cleaner portion; there was less clay and sand stratas, and, as shown by the oil-lamps that we used for inspection, it would appear that it was good coal, but on taking it out, of course the bone coal was shown up in predominance.

Q. Well, state what he said in reference to that?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—We observed that the lower portion of the vein was much better than the upper portion; but Mr. King stated that this lower portion, as we saw it in the breast of the new tunnel, was—they knew nothing about it in the breast of the old works, and that this dirty upper portion was the strata from which they took their coal and supplied the trade at Salmon the previous year, and that the breast in the old works then had more than five feet of clean coal that did not have to be sorted.

Mr. RICHARDS.—Q. What reference did he make to this strata you have just been describing?

A. In the breast, the lower strata they knew nothing about; and he explained to us that at the lower strata in the new entry was so much better quality than the upper strata in the new entry, what right had we to—that we would naturally know there was a very fine grade of coal in the breast that they had

(Testimony of John G. Richards.)

never touched, and that there would be in the breast ten feet, or about ten feet, of good, clean coal.

Q. What did he say in reference to the new breast, which you could not see, being similar to the breast which you could see? That's what I want to know.

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That the breast that we could not see was a great deal better; that it had a clean product; while in the breast of the entry that we could see we knew that it was not a clean product.

Mr. RICHARDS.—Q. What, if anything, did he say in reference to the breast that you could not see being the same layer as the one you could see—the lower layer?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—The lower layer in the old breast we couldn't see, and he had never seen; but we could see it.

Mr. RICHARDS.—Q. I am asking you what he said, Mr. Richards.

A. Well, that's what he said.

Q. Well, tell us, then, what he said in reference to these layers being the same or not.

A. Well, he said that the upper strata in the new —in the old entry—

Q. Now, which do you mean, new or old? You said both.

A. Well, he said the old entry was the same as the upper strata in the new entry.

(Testimony of John G. Richards.)

Q. Now, what do you mean by "the upper strata in the new entry"?

A. The portion above the clay.

Q. What was the character of that?

A. It was worthless.

Q. What do you mean by "the lower strata in the new entry"?

A. The portion from which they were taking their coal at that time.

Q. What was the character of that strata?

A. It was coal that they sorted and delivered to the people at Salmon.

Q. Then what did he say with reference to the breast which you could not see being the same or not as that lower strata which you could see?

A. That the lower strata was unknown in the new entry—in the old entry.

Q. You don't answer my question at all. I asked you what he said relative to it being the same stratas or not, which you have pleaded. You have set out on page 4—

Mr. CLARK.—I object to counsel reading the pleadings to the witness, as being improper in the examination.

Mr. RICHARDS.—(Reading from pleadings:) Q. "That the said defendant stated and represented that the entire breast designated as the old room in the workings and excavations on said property, was clean coal, and did not require any sorting, and was the same strata as the upper strata then exposed at the breast of the new entry." State what he said

(Testimony of John G. Richards.)

in reference to that matter.

Mr. CLARK.—That is objected to as incompetent and immaterial, and for the further reason that counsel's attempt to "coach" the witness by reading the pleading to him, is entirely improper, and makes the question leading.

WITNESS.—I will have to answer that, Judge, as I answered it before.

Mr. RICHARDS.—Q. Well, you haven't answered it yet. Just answer it.

A. The upper strata in the new opening was the same as the breast of coal that they had in the old workings.

Q. Well, is that all he said?

A. And that the lower strata was unknown—the lower strata that was shown in the new entry was unknown in the old entry—the breast of the old works.

Q. Was the new entry the one that you could see or could not see?

A. It was the one we could see.

Q. Well, is that all he said about that matter?

A. Well, he said that we had a right to presume that if the bottom strata in the new entry was so much better than the upper strata, that when we got into the breast we would have underlying the old workings a very superior grade of coal, in proportion to what they were outside.

Q. About what time did the cave or other difficulty arise, by which entry to these workings was prevented?

(Testimony of John G. Richards.)

A. Well, I was told it was in the early spring.

Q. In what year?

A. Of 1908—February or March.

Q. While you were there at Salmon with Mr. Lamborn and Mr. King, and at the time you entered into this contract, what did you do in reference to giving a note, or making the payments mentioned in the contract?

A. Well, we followed out the terms of the contract.

Q. Well, I am asking you what you did?

A. We paid Mr. King $7,500.00. There was $6,000.00 of this in cash, and two notes for $750.00 each, given by myself.

Q. By whom were those notes signed, Mr. Richards? A. By myself.

Q. Was any other payments made him, or notes given? A. No, sir.

Q. When did you again see Mr. King, after you left there on that occasion?

A. Well, I was with him—I stayed in Salmon until some time in September; that is, stayed in and about Salmon, Idaho, until the latter part of September, when I left for Texas and Oklahoma.

Q. Well, I am asking when you saw him again on that occasion?

A. Well, I took Mr. Lamborn to Red Rock—

Q. No—no. I say, after you left that part of Idaho on that occasion when did you again see Mr. King?

(Testimony of John G. Richards.)

A. About the 15th of November, on my return from Texas.

Q. When did you again visit the mine?

A. On my return from—the next day after my return from Texas, about the 16th of November.

Q. And how did you find the conditions there at that time?

A. I found the development going on as I had suggested it, and the coal layers appeared to improve.

Q. Were you able at that time to see the part of the mine which you were not able to see on the previous visit? A. I was not.

Q. For what reason?

A. For the reason of caves, and there was still bad air.

Q. When did you again visit the mine after that occasion?

A. I visited it daily until, I believe, some time in March.

Q. What year? A. 1909.

Q. When were you first able to go into the workings which you had not been able to see on previous occasions?

A. About—well, it was the latter part of January.

Q. What year? A. 1909.

Q. Describe what you saw then.

A. I saw the room—the main room from which Mr. King had been extracting coal the year before we took charge, and I found a breast of five feet or

more of coal that was not clean coal, but had to be sorted, the same as that which we had been working since we had taken charge.

Q. What, if any, information did you secure about that time with reference to the coal production of the mine during the time Mr. King had stated to you its production, as you have given it heretofore?

Mr. CLARK.—That is objected to as incompetent and immaterial. It appears that the answer of the witness is to be based upon hearsay testimony which he received from parties, concerning which he knows nothing himself of his own knowledge, and for that reason, also, it is objected to as incompetent and immaterial.

WITNESS.—I found the stubs for the weights of the previous year.

Mr. RICHARDS.—Q. What, in a general way, did those stubs show?

Mr. CLARK.—That is objected to as incompetent and immaterial, and for the further reason that it is not shown that these stubs were made by this witness, or under his direction, or that he had any personal knowledge of the accuracy of these stubs.

Mr. RICHARDS.—I am not asking him to state anything that is contained in them, only in a general way.

Mr. CLARK.—Well, "in a general way" is what they contain.

Mr. RICHARDS.—Q. Just tell us what they showed, in a general way.

A. The tonnage for each sale, made to whom, and

(Testimony of John G. Richards.)
the date it was delivered.

Mr. RICHARDS.—Q. Who, if anyone, was in charge of the property while you were there?

A. Mr. Miller.

Q. Can you give his initials?

A. F. C. Miller.

Q. Is he here? A. He is.

Q. What, if any, conversation did you have with Mr. King, subsequent to that time, in reference to the question of this tonnage?

A. I frequently asked him to supply it to us, and he always had excuses for not giving it, being busy.

Q. Did you inform him in reference to these stubs, and what they showed? A. Yes, sir.

Q. What did he say in reference to those matters?

A. Oh, he said that didn't make any difference; he supplied 2,300 tons, and he knew it, and that he could show that he had.

Q. Well, what did you say?

A. I asked him to show me the checks, or some information in the way of stubs or receipts, that would indicate this tonnage, and he said he would; that the first portion of them was down at Mr. Kingsbury's livery-stable, and part of them was at Mr. Matthewson's, and informed me in the afternoon that he could not get these.

Q. What, if any, further conversation did you have with Mr. King in relation to your dissatisfaction with this matter, because of the evidence disclosed by these stubs?

(Testimony of John G. Richards.)

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—I told him that it didn't seem that we were going to equal the tonnage of the previous year, as the stubs would indicate, from November 16th, the time we took charge of the property, that is, stubs that he had represented to be his tonnage, and that I would like for him to show us where he had supplied that amount; that Mr. Lamborn was very anxious and wished to have it verified, and that I had also satisfied myself that he had not supplied 300 tons to the Copper Queen mine; and he informed me that he had supplied a great deal more than 300 tons.

Mr. RICHARDS.—Q. What, if anything, did you say to him in reference to what you saw in the breast, which you say he said was clean coal and did not need sorting?

A. I told him that we had found this discrepancy in his representations, and to which he just laughed. He said that I had better go and look at it again; it must be perfectly clean coal, because he knew it was.

Q. Did you look at it again? A. Yes, sir.

Q. What did you find?

A. I found that my first impression was correct.

Q. What, if anything, did you say to him in reference to the statement you say he made, that the breast in the workings which you say you could not see for a while, was the same as the lower layer, and the one you could see?

A. I told him that I had found that they were

(Testimony of John G. Richards.)

the same, and not different, as he had represented to us. How is that question, Judge?

Mr. RICHARDS.—Just read it to him, please, Mr. Hamer.

(The Special Examiner thereupon repeated the last question.)

WITNESS.—Oh! I stated to him that the breast in the old works was the same as the upper strata in the new works.

Q. Well, what did he say, if anything?

A. And he said that he was satisfied that they were the same.

Q. What, if anything, was said there in reference to terminating the contract, and turning the property back to him, and so on?

A. I told him that if the tonnage was not as he had represented it, and that if we were not able to—if he was not able to show that we had the same quality of coal in the breast that he had represented to us, and that the extent of the property was not as he had represented to us, we certainly would want a reconsideration of the contract.

Q. What did he say?

Q. What did he say?

A. He told me that the contract—the deal satisfied him, and if we did not like it we could do the best we could with it.

Q. Is that all that was said?

A. I told him that I thought that was the basis on which he was working, and we certainly would have to do the best we could.

(Testimony of John G. Richards.)

Q. What, if anything, was said about the return of the notes?

A. I asked for a return of everything.

Q. What did he say?

A. Well, that is when he answered that the deal satisfied him, and if we didn't like the deal we could do the best we could.

Q. I am not certain, Mr. Richards, but what I misunderstood you with reference to the statement about the breast of the workings you couldn't see being the same as the upper or lower strata of the breast that you could see. I wish you would make that statement clear. I may have misunderstood you.

A. The breast that we found in the old works was the same as the lower strata in the new works. That is what we found.

Q. Now, what was the character of the lower strata in the new works?

A. It was much better than the upper works—than the upper strata.

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Richards, what is your age? A. 35.

Q. And what is your occupation?

A. Why, investing in real estate and mines. I promote the sale of mines.

Q. Before you met Mr. King had you been in the Salmon River country?

A. I believe I got there the spring before. If I remember rightly it was in May.

(Testimony of John G. Richards.)

Q. In May of what year?

A. That would be in the year of 1905.

Q. And you met Mr. King when?

A. The spring of 1906.

Q. Were you in and around Salmon City and that vicinity, from May, 1905, until the spring of 1906?

A. Yes, I was in and out.

Q. There was a good deal of talk of a railroad building in there at that time, wasn't there?

A. Yes, there was railroad discussion.

Q. It was thought that any coal mines in that country would become profitable? A. Yes.

Q. On account of that railroad building there?

A. Yes.

Q. And you heard of the King mine, or the old Pollard mine, as it was known at that time?

A. Yes, sir.

Q. And it was generally reported to be a good mine? A. No, sir.

Q. It wasn't reported to be a good mine?

A. No, sir.

Q. A poor mine?

A. There wasn't a great deal said about it.

Q. Well, what was the reports that you heard concerning this Pollard mine?

A. Well, I saw the product on the street, and asked where it came from, and they informed me it came from the Pollard mine.

Q. Being sold generally there in Salmon?

A. No, not generally.

Q. Did you ask where it came from?

(Testimony of John G. Richards.)

A. Yes, sir.

Q. And you were told it came from the Pollard mine? A. Yes, sir.

Q. You were interested somewhat in mining there? A. Yes, sir.

Q. You are in a sense a mining engineer, are you?

A. Yes, sir.

Q. You have taken a course as a mining engineer, have you? A. I never completed a course.

Q. You have taken considerable work along that line, however?

A. Yes, in a practical way considerable.

Q. You have made some investigations of coal mines? A. No, sir.

Q. Did you investigate the coal mine at Victor, Idaho? A. At Victor, Idaho?

Q. Yes. A. No, sir.

Q. Were you ever at Victor? A. No, sir.

Q. You never were there?

A. Not at Victor, no, sir.

Q. Did you ever make any investigations of coal mines at any place? A. No, sir.

Q. Did you ever take any course in mining, or coal mining? A. No, sir.

Q. How? A. No, sir.

Q. Now, you know in a general way—you have knowledge in a general way of mining operations, haven't you? A. Yes, sir.

Q. You are what might be popularly called a promoter, aren't you, Mr. Richards? A. Yes.

Q. It is your business to procure for sale proper-

(Testimony of John G. Richards.)

ties of various kinds and hunt someone to purchase them? A. Yes, sir.

Q. And how many years' experience have you had in that particular line of work?

A. Well, my experience really began at Salmon.

Q. Hadn't you had any experience before that?

A. No, sir.

Q. Well, what had you been doing before that?

A. I had been in Cripple Creek most of the time for about six years before that.

Q. What had you been doing in Cripple Creek?

A. I had been leasing and operating contracts.

Q. For yourself, or other people?

A. Leasing in partnership with others, and contracting on mines.

Q. Contracting for the sale of mines?

A. No—no—for driving drifts and tunnels.

Q. Driving drifts and tunnels?

A. Yes, sir.

Q. You had been engaged in that work for about six years? A. Yes, sir.

Q. At Cripple Creek? A. Yes, sir.

Q. And from there you came to the Salmon River country?

A. Yes, sir.

Q. And how long were you in Salmon City or that vicinity before you left there, when you came there in 1905?

A. I forget what time it was I left, but it was in July or August.

Q. 1906? A. No—1905.

(Testimony of John G. Richards.)

Q. Well, you say you came there, as I recollect it, in May, 1905, didn't you? A. Yes, sir.

Q. And you left there in July or August, 1906?

A. 1905—first.

Q. First? A. Yes.

Q. Well, when did you meet Mr. King first?

A. The first spring he was in Salmon; I believe 1906.

Q. Well, then, you had been there then from May, 1905, to July or August, 1905? A. Yes, sir.

Q. Now, you went away from there about that time? A. Yes, sir.

Q. Where did you go then?

A. Butte, Montana.

Q. And what were you engaged in doing there?

A. I only stayed there three days, and I went from there to Denver, Colorado.

Q. What were you doing in Denver?

A. I went there in answer to a request of some mining men.

Q. What was your business there?

A. I had written in reference to a property I had seen while at Salmon, and they wished me to come down and discuss this property with them.

Q. And when did you come back to Salmon?

A. I believe it was the evening I got there. I got there about 11 o'clock, and left that evening for Idaho.

Q. When did you arrive at Salmon again?

A. Well, it was just the necessary time—what time was necessary to make the trip from Denver.

(Testimony of John G. Richards.)

It would be in August.

Q. 1905? A. 1905.

Q. And you stayed there then until 1906?

A. Yes, sir.

Q. And it was in the spring of 1906 that you met Mr. King? A. Yes, sir.

Q. Now, you say you became acquainted with Mr. King about what time in 1906?

A. I believe it was about April.

Q. April, 1906? A. Yes, sir.

Q. And when was it you first saw this mine?

A. I didn't see the mine until 1907.

Q. You never saw it at all in 1906?

A. No, sir.

Q. What time in 1907 did you first see it?

A. Well, the latter part of August or first of September.

Q. Did you remain in Salmon and that vicinity from August, 1906, until you saw the mine in 1907?

A. No, sir.

Q. Where were you?

A. After leaving Salmon I went to Denver.

Q. Well, when did you leave Salmon?

A. I think it was about—I left January—or left Salmon—do you mean after meeting Mr. King?

Q. Yes.

A. Well, I left the 19th of December of that year.

Q. 1906? A. Yes, sir.

Q. And where did you go then?

A. I went to Denver, and I was there about a week, and went down to the ranch, and I was there

(Testimony of John G. Richards.)
about two weeks, and I went to Fort Worth and El Paso.

Q. Well, when did you return to Salmon?

A. I returned to Salmon the following August—1907.

Q. Was that the time when you first saw the mine?

A. That is the time I first saw the mine.

Q. Now, you were around Salmon there a good deal, weren't you, for two or three years?

A. Yes, sir.

Q. As a matter of fact you were selected as a delegate to the State Republican Convention, weren't you? A. I was sent there, yes, sir.

Q. What year was that?

A. I think that was—it was 1908.

Q. 1908? A. Yes, sir.

Q. And you considered yourself a citizen of that place? A. No, sir.

Q. You sat on juries over there, didn't you?

A. Yes, sir.

Q. In the District Court? A. Yes, sir.

Q. And went to the State Republican Convention? A. Yes, sir.

Q. You didn't consider yourself a citizen of that place?

A. No, sir—I informed them so at the time.

Q. You informed them so at the time? Who did you inform? A. Mr. Shoup.

Q. Who was Mr. Shoup?

A. Mr. Shoup was one of the delegates to the convention.

(Testimony of John G. Richards.)

Q. You informed him, but did you inform the Court that you didn't consider yourself a citizen?

A. I wasn't asked if I was a citizen.

Q. And you didn't inform them?

A. No, sir.

Q. And you wasn't asked if you was a citizen?

A. No, sir.

Q. Now, you say that in August, 1906, you saw Mr. King, and he was telling you that he had purchased this property—this coal property?

A. Yes, sir. Well, he had written to me in regard to it before.

Q. He had written to you in regard to it before?

A. Yes, sir.

Q. Before he purchased it?

A. At the time of his purchase.

Q. And in August, 1906, you saw him and he was telling you about this purchase?

A. In August of 1907.

Q. 1907, was it? A. Yes, sir.

Q. All right—1907. He was telling you of this purchase at that time? A. Yes, sir.

Q. And you and he were very friendly?

A. Yes, sir.

Q. And he suggested to you that you go out and look at the mine? A. Yes, sir.

Q. And you went out there? A. Yes, sir.

Q. And he was asking your opinion about it?

A. Yes, sir.

Q. He asked you whether you thought that was a good buy or not? A. Yes, sir.

(Testimony of John G. Richards.)

Q. And you told him if it was developed along the same lines, that it looked all right to you?

A. Yes, sir.

Q. And you were very favorably impressed with it? A. Yes, sir.

Q. Well, now, what was there about this mine that impressed you so favorably at that time?

A. The thickness of the vein.

Q. Where was this vein that was so thick, that impressed you so?

A. Where Mr. Pollard was working.

Q. Where Mr. Pollard was working?

A. Yes, sir.

Q. And that was in the old Pollard workings, was it? A. Yes, sir.

Q. Well, now, how thick was the vein at that particular place?

A. Oh, it was five feet, or six feet.

Q. Did you ever see that vein again?

A. I have seen it since.

Q. When?

A. I saw it—well, I last saw it in May, of this year.

Q. 1909? A. 1909, yes, sir.

Q. How thick was it then?

A. About the same, or a little more.

Q. A little more, wasn't it? A. Yes.

Q. How much more?

A. Well, in regard to being thicker, it was—the formation lays in ribs, or slabs, and the break was about—oh, more than seven or eight feet; that is, the

(Testimony of John G. Richards.)

opening would be seven or eight feet; but there was five to six feet we tried to sort.

Q. The quality of the coal was the same as when you first looked at it?

A. When I first looked at it?

Q. Yes.

A. When Mr. Pollard was working?

Q. Yes.

A. Well, I don't remember just the difference; there wasn't a great deal of difference either one way or the other.

Q. About the same way one as the other?

A. Yes, sir.

Q. If anything, a little better, wasn't it?

A. Well, there was a small strata at the bottom that I believe was better than I had noticed when Mr. Pollard was working.

Q. Well, then, the vein in the old workings looked better the last time you saw it?

A. Well, there wasn't much difference.

Q. Well, it was wider and thicker, wasn't it?

A. Well, it was only broken wider. I should say that what we called the paystreak was about the same.

Q. Well, did you make any measurements to see if it was? A. No, not exactly.

Q. Well, now, you say that when you and Mr. King were talking over this mine this particular vein was described, and you couldn't get in to look at this particular breast?

(Testimony of John G. Richards.)

A. No. No, we couldn't get in to the old workings.

Q. But you had seen it prior to that time?

A. I had seen it when Mr. Pollard was working, but I hadn't seen the portion in which the old breast that Mr. King spoke of was.

Q. Why hadn't you seen that?

A. Because it hadn't been mined out.

Q. How? A. It hadn't been mined out.

Q. It hadn't been mined out?

A. No—to the extent that Mr. King had worked it.

Q. Well, but you understood that the Pollard workings had not been worked since Mr. Pollard had it, didn't you?

A. Well, the opening had been carried on, yes. That room, you might call it, had been carried on further into the hill.

Q. Well, now, what particular misrepresentation of Mr. King was it that you complain of as to those old workings?

A. The portion that we couldn't see?

Q. Yes.

A. Well, he claimed that the breast there didn't have to be sorted; it was five feet or more of clean coal.

Q. Did it have to be sorted? A. Yes, sir.

Q. It has to be sorted? A. Yes, sir.

Q. That is the only objection which you had to his statements? A. Yes.

Q. He didn't make any other statements that

(Testimony of John G. Richards.)

seemed to you unreasonable? Now, don't you know as a matter of fact that all coal has to be sorted?

A. Well, not as this coal is sorted—not to the same extent.

Q. Well, don't you know that all coal has to be sorted? A. Well, no.

Q. How?

A. There is some coals that you don't have to sort.

Q. Did you think that that coal in there was such coal that it didn't have to be sorted?

A. I supposed it was.

Q. You supposed that it was? A. Yes, sir.

Q. From your knowledge of the mine?

A. No—from my belief in Mr. King. I believed that—

Q. Well, were they working that particular place at the time you were up there?

A. When we went in to purchase the property?

Q. Yes. A. No, sir.

Q. How long had it been since they were working it?

A. I understood they didn't work there since the cave, which was in the spring.

Q. Of what year? A. Of 1908.

Q. Of 1908? A. Yes, sir.

Q. Now, was Mr. Miller there?

A. Mr. Miller was there, yes, sir.

Q. You knew Mr. Miller, didn't you?

A. I had met him before, yes.

Q. You made some inquiries of Mr. Miller, didn't you? A. Yes.

(Testimony of John G. Richards.)

Q. About this particular vein, didn't you?

A. Yes; we discussed—I asked questions of Mr.—

Q. Did Mr. Miller tell you it didn't have to be sorted?

A. Mr. Miller was—wouldn't give us any definite information. Mr. Miller was noncommittal.

Q. Did you ask him if it had to be sorted?

A. I don't remember whether I asked him or not.

Q. You didn't ask him?

A. I don't remember.

Q. You were asking him concerning this mine?

A. Well, we discussed the maps and such as that, and the works.

Q. And how he was getting along?

A. Yes, sir.

Q. And about his tonnage?

A. I don't remember about the tonnage. I think I may have asked him about the tonnage, but I got no information from him.

Q. And did you ask him about this vein in the old workings? A. Yes.

Q. And what was your object in that?

A. Well, I was interested in getting what information I could out of it—in regard to it.

Q. That was your purpose there? A. Yes.

Q. You got what information you could about that mine? A. Well—

Q. Wasn't that your purpose there, Mr. Richards? A. At the mine?

Q. Yes.

A. Why, I wanted to see the mine, yes.

(Testimony of John G. Richards.)

Q. You wanted to examine the mine and get what information you could out of it? A. Yes, sir.

Q. Preparatory to purchasing it?

A. Yes; but I—

Q. And you had Mr. Lamborn there with you?

A. At one time, yes, when we proposed to close the deal.

Q. And at this particular time?

A. No. I was there several days before Mr. Lamborn came.

Q. And you were investigating the mine, were you?

A. Well, I was out there a time or two.

Q. How many times?

A. Well, I don't know.

Q. Pretty nearly every day, wasn't it, Mr. Richards?

A. No, not every day, because I was out of town a good portion of the time, down the river.

Q. Well, you were there almost every day you were in town, weren't you?

A. No, not every day.

Q. How many times?

A. I don't know.

Q. About how many times?

A. Well, I couldn't guess, but I might have been there three or four times.

Q. Did you go in the mine at any time?

A. I don't remember that I did go in the mine. I don't think I did.

Q. Well, what was your purpose there?

(Testimony of John G. Richards.)

A. Well, I was doing something to pass away the time.

Q. You knew that you had a deal on concerning this mine, didn't you? A. Yes, sir.

Q. And you were trying to inform yourself all you could about it, weren't you?

A. Yes. I thought I had, though, all the information I needed.

Q. You were trying to inform yourself all you could, weren't you? A. Yes.

Q. It isn't your habit to buy properties without informing yourself as to how the properties are, as to value, is it?

A. I generally make an examination.

Q. Now, you talked with Mr. Pollard about this some, didn't you?

A. I don't remember that I did.

Q. Well, will you say you didn't?

A. I don't remember that I did.

Q. Will you say you didn't?

A. Well, I don't remember that I had any conversation with him.

Q. Did you talk with anybody else concerning it?

A. I might have spoke in a passing way about it, but not to any specific individual.

Q. Well, with whom?

A. I don't remember.

Q. You don't remember? A. No, sir.

Q. You understand computing the amount of material that can be taken from any given space, don't you? A. Yes.

(Testimony of John G. Richards.)

Q. Now, you saw the workings there in the mine, didn't you?

A. I didn't see all of the old workings.

Q. You didn't see all of the old workings?

A. No.

Q. Well, you were in there the first time you went up, weren't you?

A. Yes. But Mr. King hadn't opened up this room at that time.

Q. He hadn't opened it up?

A. That is, he hadn't continued it.

Q. Well, couldn't you get in there the second time you went to see the mine?

A. No—it was considered unsafe.

Q. Well, weren't the other people working in there? Weren't they taking coal out of there?

A. They were working in the breast of the new entry.

Q. They were not working in the old entry?

A. Not very far from it. We might have been able to get out in a very short distance.

Q. You could see what had been done there?

A. Well, we could throw the lights back and see the opening there.

Q. And you could see the walls?

A. No, I don't know that we could see the walls, on account of the cave.

Q. Now, on the first day of March, 1908, you entered into this agreement that has been marked Plaintiff's Exhibit "G," did you, with Mr. King?

A. Yes, sir.

(Testimony of John G. Richards.)

Q. Now, how many times had you been to this mine before you entered into this agreement?

A. Just the time with Mr. King.

Q. Just that time with Mr. King?

A. Yes, sir.

Q. And that is the time when you advised him as to the fact that you thought he had a great property there, if it developed as it looked as if it was going to develop? A. Yes, sir.

Q. And you conceived the idea that you could sell this property for Mr. King? A. Yes, sir.

Q. And with that object in view you prepared this agreement, which you both signed?

A. Yes, sir.

Q. Now, when was it after March, 1908, that you left Salmon City? A. After March,—

Q. 1908?

A. 1908? I wasn't in Salmon before March of 1908.

Q. Well, was this agreement sent to you somewhere?

A. No. I sent that agreement myself.

Q. Where from?

A. I believe I sent it from Winfield.

Q. Kansas? A. Yes, sir.

Q. You sent this agreement to Mr. King?

A. Yes, sir.

Q. That was when you were contemplating making your trip to the East to see if you could interest somebody in this property? A. Yes, sir.

Q. And you wanted this agreement before you

(Testimony of John G. Richards.)

went? A. Yes, sir.

Q. Did you have anybody in view at that time?

A. No, not particularly.

Q. You were simply going out to see if you couldn't dispose of it in the open market?

A. Yes, sir.

Q. Or wherever you might find a purchaser?

A. Yes, sir.

Q. Now, had you talked over your commission with Mr. King before you left Salmon City?

A. We had discussed that.

Q. And you were to have how much, you say?

A. I asked $25,000.00 for making the sale.

Q. $25,000.00 for making the sale?

A. Yes, sir.

Q. And was the agreed price here of $80,000.00 to be the price for the mine, or was that to include your commission?

A. That was including my commission.

Q. He was to get $80,000.00 for the mine, and out of that you were to have $25,000.00 for your commission? A. I was to have $30,000.00.

Q. $30,000.00?

A. Yes, sir; all over $50,000.00.

Q. All over $50,000.00? A. Yes, sir.

Q. Then, in making a sale you expected to obtain a commission of $30,000.00 on this $80,000.00 price?

A. Yes, sir.

Q. And you didn't expect to buy this property yourself?

A. No, I didn't. It is hard, usually, for one to

work into an interest when he is making a sale, or, at least, it has been my experience—

Q. You didn't expect to buy this property yourself and pay $80,000 for it, did you?

A. Oh, no. No.

Q. You wrote Mr. King some letters concerning this deal before this agreement was entered into, didn't you? A. I believe so.

(At the request of Mr. Clark the Special Examiner marked a certain letter for identification as Defendant's Exhibit 1, on cross-examination.)

Q. I show you paper marked for identification as Defendant's Exhibit 1, on cross-examination, and I will ask you who signed that, and whose letter it is?

A. It would seem like it was mine.

Q. Well, is it yours? A. I guess it is.

Q. Well, is it yours, or do you know whether it is yours or not?

A. Well, I rather think it is.

Q. Is that the best answer you can give me, sir?

A. I think that is my letter.

Q. Can't you say definitely, Mr. Richards, whether that is your letter or not, and whether you signed it?

A. I rather think that is my letter.

Q. Is that the only answer you will give me?

A. Yes, sir.

Q. You merely want to be understood as saying that all you know of it is that you think it is your letter? A. Yes, sir.

Q. You don't know whether it is or not?

(Testimony of John G. Richards.)

A. I think it is my letter.

Q. Do you know whether it is your letter or not?

A. I think so.

Q. Will you answer my question or not? Do you know whether that is your letter or not?

A. I think that is my letter.

Q. And is that the only answer you will give me?

A. Well, I think that is an answer.

Q. Do you know whether that is your letter or not?

A. I think that is my letter, Mr. Clark.

Mr. RICHARDS.—Oh, if you know, state whether it is.

WITNESS.—Well, yes, it is my letter.

Mr. CLARK.—Judge, I will offer this. I think it is one of the letters you offered the reply to.

(Mr. Clark submitted said letter to Mr. Richards, who examined the same.)

Mr. CLARK.—I suppose I may go ahead?

Mr. RICHARDS.—Go ahead.

(At the request of Mr. Clark the Special Examiner marked a certain letter for identification as Defendant's Exhibit 2, on cross-examination.)

Mr. CLARK.—I show you paper marked for identification as Defendant's Exhibit 2, and ask you if you wrote that letter? A. Yes, sir.

Mr. CLARK.—I also offer in evidence letter marked for identification as Defendant's Exhibit 2.

(Mr. Clark submitted said letter to Mr. Richards, who examined the same.)

Mr. CLARK.—Defendant's Exhibit 1 is admitted

(Testimony of John G. Richards.)
without objection, as I understand it?

Mr. RICHARDS.—Yes.

(At the request of Mr. Clark the Special Examiner marked a certain letter for identification as Defendant's Exhibit 3, on cross-examination.)

Mr. CLARK.—Q. I show you a letter marked Defendant's Exhibit 3, on cross-examination, and ask you if you know who wrote that letter?

A. That is mine.

(At the request of Mr. Clark the Special Examiner marked a certain letter for identification as Defendant's Exhibit 4, on cross-examination.)

Mr. RICHARDS.—The letter marked Exhibit 2 we have no objection to. There is no objection to Exhibit 3.

Mr. CLARK.—Very well, Judge.

A recess was thereupon taken until 1:30 o'clock P. M.

At 1:30 o'clock P. M. the further taking of testimony was resumed.

JOHN G. RICHARDS, a witness heretofore called by the plaintiffs, and duly sworn, resumed the witness-stand for further cross-examination, and testified as follows, to wit:

Cross-examination (Continued).

(By Mr. CLARK.)

Q. After you had procured this agreement referred to, whereby Mr. King gave you an option on this property for $80,000.00, you then went East to see if you could swing this proposition, did you, Mr. Richards? A. Yes, sir.

(Testimony of John G. Richards.)

Q. You wrote Mr. King that you were going to stop off in Washington, D. C.? A. Yes, sir.

Q. Did you stop off in Washington and attempt to spring the deal there? A. Yes, sir.

Q. And from there you went to New York City?

A. Yes, sir.

Q. And saw Mr. Lamborn? A. Yes, sir.

Q. Had you been acquainted with Mr. Lamborn prior to that time? A. Yes, sir.

Q. For how long?

A. I was with him for more than a week once before.

Q. Where was that? A. In Old Mexico.

Q. Were you there engaged in some mining propositions?

A. I was looking over the country, trying to find a copper proposition.

Q. Mr. Lamborn is a broker in New York City?

A. I believe so.

Q. And you met him in Old Mexico?

A. Yes, sir.

Q. And had been with him about a week, and became pretty well acquainted with him?

A. Well, as well as one could, yes, in that time.

Q. And during the time that you were in Mexico you had been somewhat intimately associated with him? A. Yes, sir.

Q. Now, you say you went to New York City and showed Mr. Lamborn this agreement that you had procured from Mr. King? A. Yes, sir.

Q. And explained to him the proposition?

(Testimony of John G. Richards.)

A. Yes, sir.

Q. And explained to him the facts as to your connection with the matter, did you? A. Yes, sir.

Q. You told him that you were receiving a $30,000.00 commission for this transaction?

A. No, sir.

Q. You didn't tell him that? A. No, sir.

Q. Did you represent to him that you were purchasing this property? A. No, sir.

Q. Did you represent to him that you were willing to purchase a one-fourth interest in the property?

A. Yes, sir—that I was willing to, yes, sir.

Q. So far as Mr. Lamborn knew, you were not receiving any commission from this sale?

A. There was nothing said about commission.

Q. You represented to him that you and he would go in together and purchase this property at this sum of $80,000.00, if you could interest him?

A. Yes, sir.

Q. And that was the way Mr. Lamborn understood it, was it? A. Yes, sir.

Q. Now, you knew that that was not the fact, didn't you?

A. That we were going in together?

Q. Yes?

A. I knew we were trying to purchase the property together.

Q. Don't you know as a matter of fact, Mr. Richards, that Mr. Lamborn understood that you were putting up your proportion of the money, or that you

(Testimony of John G. Richards.)

would put it up? A. Yes, sir.

Q. And you allowed him to believe that, didn't you? A. Yes, sir.

Q. And still you knew that was not the fact, didn't you? A. But I did.

Q. How? A. But I did.

Q. You knew that was not the fact of what you intended to do at that time, didn't you?

A. I knew that I intended to put up the money, and I have.

Q. That is, you intended to acquire your one-fourth interest by virtue of the fact that you were to receive a $30,000.00 commission?

A. I was to pay for my portion—one-fourth.

Q. And you were to pay for that out of this commission which you were to receive? A. No.

Q. How? A. No.

Q. Did you intend to pay dollar for dollar along with Mr. Lamborn? A. Yes, sir.

Q. You intended to do that, did you?

A. Yes, sir.

Q. And you intended to do that when you were in New York City? A. Yes, sir.

Q. Then if you should agree on a purchase price of $80,000.00 for a half interest, or for a whole interest, you were to put up $40,000.00 of that money?

A. Yes, sir.

Q. That was your intention?

A. Yes, sir.

Q. And you so represented to Mr. Lamborn?

A. Yes, sir.

(Testimony of John G. Richards.)

Q. How much money has been paid on this transaction? A. $21,000.00.

Q. Did you pay any part of that?

A. I paid $1,000.00 cash.

Q. Well, that was all that you paid of the $21,000.00? A. Yes, sir.

Q. And Mr. Lamborn paid the balance?

A. Yes, sir.

Q. Well, then, Mr. Lamborn paid $20,000.00, and you paid $1,000.00? A. Yes, sir.

Q. Well, did Mr. Lamborn pay any proportion of that for you? A. No.

Q. Well, then you gave notes, didn't you?

A. Yes, sir.

Q. Your notes were separate notes from those given by Mr. Lamborn? A. Yes, sir.

Q. They were not joint notes, were they?

A. No, sir.

Q. You gave notes for how much money?

A. That would be $9,000.00.

Q. That would be $9,000.00? A. Yes.

Q. And Mr. Lamborn for how much?

A. $10,000.00.

Q. Then Mr. Lamborn, if he had paid that note, would have put up $30,000.00? A. Yes, sir.

Q. And if you paid your note you would have put up $10,000.00? A. Yes, sir.

Q. And that was the full purchase price of a half interest in this mine, wasn't it—a 3/4 interest in this mine?

A. In addition to certain bonds that we after-

(Testimony of John G. Richards.)

wards agreed upon, that Mr. King would take for the balance of $60,000.00.

Q. Yes; but that was all that you and Mr. Lamborn were to put up?

A. Yes; we were putting up $40,000.00.

Q. You were putting up $40,000.00, and then you were bonding the property? A. Yes, sir.

Q. For how much?

A. Well, that was discussed; I believe—I forget what the bond issue exactly is.

Q. The bonds were to cover the entire property, weren't they? A. Yes, sir.

Q. And all that you would be in on this proposition, then, would be $10,000.00? A. Yes, sir.

Q. Now, you say you represented to Mr. Lamborn that you were paying for your one-fourth interest in this mine? A. Yes, sir.

Q. And that was the fact? A. Yes, sir.

Q. You sent this contract to be signed by Mr. King from Winfield, Kansas, didn't you?

A. I believe so.

Q. And wrote him a letter at that time along with the contract? A. I probably did.

(At the request of Mr. Clark the Special Examiner marked a certain letter for identification as Defendants' Exhibit 5, on cross-examination.)

Q. I show you paper marked Defendants' Exhibit 5, and ask you if that is the letter you wrote Mr. King at the time you sent him the agreement?

A. Yes.

Mr. CLARK.—I will offer this in evidence.

(Testimony of John G. Richards.)

(Mr. Clark submitted said letter to Mr. Richards, who examined the same.)

Mr. RICHARDS.—No objection.

Mr. CLARK.—Q. In this letter you use this language, Mr. Richards: "Will send you agreements to sign and send me one. Of course, I am selling only a one-half, but I desire to represent that I am investing some, too, so that a contract for the whole is necessary." You used that language, didn't you? A. Yes, sir.

Q. What did you mean by saying that "I desire to represent that I am investing some, too"?

A. Well, it was in some talk with Mr. King (and it might have been by correspondence, too), I considered it would be easier to sell a one-half interest. The idea was to sell a half interest, and develop it up to a good proposition, and then we could sell the other half interest at a much better price. The idea was for Mr. King to get the money back that he had put into it, and at the same time develop the property.

Q. Who was to pay you your $30,000.00 commission? A. Mr. King.

Q. And if this deal had been carried out, was he to pay you $30,000.00? A. Yes, sir.

Q. Then, if you had gone on with this transaction you would have expected Mr. King to pay you the sum of $30,000.00, would you?

A. Yes, sir.

Q. Now, did you have some agreement with Mr.

(Testimony of John G. Richards.)

King—some written agreement—regarding this matter?

A. No, sir. I had his word, and that was sufficient.

Q. Didn't you have a written agreement as to this commission?

Mr. RICHARDS.—That was later, Mr. Clark.

Mr. CLARK.—Q. At some time?

A. I did, after the transaction.

Q. Well, why did you say you desired to represent that "I am investing some, too"?

A. That was so that we could sell the half and he and I would retain a half.

Q. Well, were you going to represent something that wasn't true?

A. Well, I was going to try to show that we were making this purchase, to whoever it might be.

Q. When you wrote that letter you didn't intend to invest anything, did you?

A. Well, I don't know. I desired to be interested in the property.

Q. You didn't intend to invest anything at that time, did you?

A. I don't know what my exact thoughts were at the time; but I know that I wanted to be interested in the property.

Q. Well, were you going to represent something that wasn't true?

A. Well, I wanted to be interested in the property.

Q. Did you want to get this contract so that you

(Testimony of John G. Richards.)
could show it to someone and make the representation that you were going to invest in this property, too, when that was not the fact?

A. But it was the fact.

Q. Then why did you say "I want to represent that I am investing some, too"?

A. Well, because I would.

Q. You would? A. Yes, and I did.

Q. When was it you saw Mr. Lamborn?

A. Some time in June—about the first of June.

Q. About the first part of June?

A. Yes, the first part of June.

Q. And that was in New York City?

A. Yes, sir.

Q. And you wrote Mr. King from New York City, didn't you? A. I think so.

(At the request of Mr. Clark the Special Examiner marked a certain letter for identification as Defendants' Exhibit 6, on cross-examination.)

Q. I show you a paper marked Defendants' Exhibit 6, on cross-examination, and ask you if you wrote Mr. King that letter from New York City, and sent it to him? A. This is mine, yes, sir.

Mr. CLARK.—We offer in evidence this paper marked Defendants' Exhibit 6.

(Mr. Clark submitted said letter to Mr. Richards, who examined the same.)

Mr. RICHARDS.—No objection.

Mr. CLARK.—Q. In this letter I call your attention particularly to where you say "I am trying on a basis of $40,000 for the ½ interest, representing that

(Testimony of John G. Richards.)

I am buying the 1/4th, which we can fix up all right between us.'' What did you mean by that?

A. I still meant that I wanted an interest in the property.

Q. That is what you meant, was it?

A. Yes, sir.

Q. And that is the only explanation you give of that, is it?

A. Well, I wanted an interest in the property.

Q. You came back out to Salmon, and $7,500.00 was paid? A. Yes, sir.

Q. Did you pay any proportion of that?

A. Yes, sir.

Q. How much? A. $2,500.00.

Q. You gave a check to Mr. King for $2,500.00?

A. Yes, sir.

Q. And Mr. King gave you his check for $2,500.00? A. He—

Q. Didn't he, now? A. Yes—yes.

Q. And you immediately tore that up, didn't you?

A. No, sir; that went the rounds.

Q. Well, then, that payment was merely a ''phony'' payment, wasn't it?

A. Why, no. He had my notes and my money.

Q. Didn't Mr. King give you a check for $2,500.-00, to offset the check which you gave him?

A. I was getting—

Q. Now, didn't he do that?

A. I arranged for the money at Higgins, Texas,—

Q. Will you answer my question, sir? Didn't Mr. King give you a check for $2,500.00, to offset the

(Testimony of John G. Richards.)
check which you gave him?

A. I don't remember that he did.

Q. Will you say that he didn't?

A. I will say that I don't remember that he did.

Q. Well, wouldn't you remember it if he did?

A. I don't remember that—no.

Q. Wouldn't you remember it if he did?

A. I should think I would, but I don't remember it.

Q. Didn't you just say that he did?

A. I said that I gave him a check for $2,500.00.

Q. Didn't you say a moment ago that Mr. King gave you his check for $2,500.00?

A. I don't understand it that way, no.

Q. Well, will you say that he didn't?

A. I will say that I don't remember it.

Q. Will you say that he didn't?

A. No, sir, I will not.

Q. And you don't recollect it? A. No, sir.

Q. Don't you know as a matter of fact that you didn't pay one cent of that $2,500.00?

A. Why, no. I paid him $1,000.00, and $1,500.00 in notes—two notes.

Q. And where are those notes?

A. Well, he has them.

Q. He has them yet? A. I suppose so.

Q. You say, then, that you did not put up your check for $2,500.00 against his check for $2,500.00, to make that payment? A. No, sir.

Q. What? A. No, sir.

Q. Don't you recollect anything about him giving

(Testimony of John G. Richards.)

you a check for $2,500.00?

A. I know that I had $2,500.00 coming, and I know that Mr. King got his check for $2,500.00.

Q. Who did you have the $2,500.00 coming from?

A. I had $2,500.00 in the bank at Higgins.

Q. Now, what did you do with this check for $2,500.00 that Mr. King gave you?

A. That Mr. King gave me?

Q. Yes.

A. Why, I remember I had a deposit—always had a deposit with Mr. King, and I don't know—I frequently would get money.

Q. But you can't recollect anything about whether you had a $2,500.00 transaction with him or not?

A. Yes, I do remember of having a $2,500.00 transaction.

Q. You took that check and sent it to your bank at Higgins, and it was returned to the First National Bank at Salmon City, wasn't it?

A. There was some exchange like that, yes.

Q. How?

A. There was an exchange of money that way.

Q. Well, did Mr. King owe you any $2,500.00?

A. Mr. King didn't owe me $2,500.00; the bank might have. I don't know what my deposit was at the time.

Q. The bank might have owed it to you?

A. I might have had a deposit of that amount.

Q. But this was Mr. King's personal check, wasn't it? A. I don't know how he signed it.

(Testimony of John G. Richards.)

Q. You gave your check on the Higgins bank, and then Mr. King gave you a check for $2,500.00, and you sent that check for $2,500.00 down to the Higgins bank to take care of this $2,500.00 check, didn't you?

A. Well, there was some exchange of money that way; I don't know just what it was.

Q. And you don't know how you happened to do that?

(No answer.)

Q. You don't know how you happened to do that?

A. No, I don't just remember the nature of the transaction. I know there was some transaction like that.

Q. And you can't tell us what that was?

A. All that I remember was that Mr. King got $1,000.00 of my money and the notes.

Q. Well, wasn't that after this transaction?

A. I don't understand—

Q. Wasn't that when the final payment in this case was made?

A. No; this was on the 3d day of July.

Q. Did you pay Mr. King $1,000.00 when the final payment was made?

A. When the final payment was made?

Q. Yes? A. No, I didn't.

Q. Did you pay him anything at that time?

A. I paid him my notes.

Q. How?

A. $7,500.00—I paid him my notes for $7,500.00.

Q. When the final payment was made?

A. Yes.

(Testimony of John G. Richards.)

Q. Well, how much have you paid, then, already?

A. I had paid $1,000.00 in cash and $1,500.00 in notes.

Q. Don't you know that after Mr. Lamborn had left Salmon City was when this $1,000.00 transaction you speak of was had between you and Mr. King?

A. I don't know just when that occurred; but it might have been after, and it might have been before.

Q. Your memory is not good as to that transaction at all, is it?

A. Not exactly; but I remember that I gave Mr. King $1,000.00.

Q. Well, if you gave him $2,500.00, why hadn't you paid him $2,500.00 in money?

A. Well, because I had given him my notes.

Q. Yes; but you stated, Mr. Richards, that you paid him $2,500.00 at the time this $7,500.00 was paid?

A. Yes. $1,500.00 of that was notes and $1,000.00 in cash.

Q. At that time—executed at that time?

A. When we went in on the deal.

Q. Was that executed at the time Mr. Lamborn was in Salmon City? Were those notes for $1,500.00 executed when Mr. Lamborn was in Salmon City?

A. I don't remember whether it was before or after.

Q. You don't remember whether it was before or after? A. Yes.

Q. Didn't you give your check in the presence of Mr. Lamborn for $2,500.00, on the Higgins State

(Testimony of John G. Richards.)
Bank? A. Yes. Yes, I did.

Q. Now, then, you didn't make that payment of $2,500.00 at that time, did you?

A. I told Mr. King that I needed—would need this money on another transaction down in Texas, or Oklahoma, and he says, "Why, Dick, you can have all the money you want here," and then we rearranged this initial payment.

Q. Yes; but at the time you gave that $2,500.00 check he gave you his check for $2,500.00, didn't he?

A. No; I don't remember anything about a transaction like that.

Q. You don't remember anything about that?

A. No, sir.

Q. Will you say that your check didn't go through the Higgins bank for $2,500.00, dated on that very day, and if Mr. King's check didn't go through that same bank, dated the same time, for $2,500.00?

A. Well, I couldn't say in regard to that.

Q. You can't say as to that? A. No.

Q. And that is all the answer you will give me in regard to that transaction, is it? A. Yes, sir.

Q. You were dealing open and aboveboard with Mr. Lamborn, were you?

A. I was letting Mr. Lamborn in on the same basis I was.

Q. There was nothing for you to secrete from Mr. Lamborn? A. No.

Q. You were in Mr. Lamborn's office in New York City when Mr. Lamborn dictated to his stenographer a telegram to Mr. King, concerning the

(Testimony of John G. Richards.)

purchase price of this property, weren't you?

A. Yes, sir.

Q. And Mr. Lamborn dictated that telegram to his stenographer, and immediately turned around to the messenger boy and told the messenger boy to take that telegram to the office?

A. Yes, sir.

Q. And that is the telegram which you sent, isn't it? (Handing same to witness, who examined the same.) A. Yes, I think that was it.

Q. You went out of his office, and, unknown to him, you sent another telegram to Mr. King, didn't you? A. The next day, yes.

Q. And you told Mr. King how to answer that telegram, didn't you? A. Yes, sir.

Mr. CLARK.—Will you mark this for identification?

(The Special Examiner marked the same for identification as Defendants' Exhibit 7, on cross-examination.)

Mr. CLARK.—I offer in evidence Defendants' Exhibit 7, on cross-examination.

Mr. RICHARDS.—No objection.

Mr. CLARK.—Will you mark this?

(The Special Examiner marked the same for identification as Defendants' Exhibit 8, on cross-examination.)

Mr. RICHARDS.—No objection.

Mr. CLARK.—Q. This is the telegram you sent?

A. I remember this portion, that—to say come on here, because Mr. Lamborn and I—

(Testimony of John G. Richards.)

Q. Well, didn't you send that telegram, in those words?

A. Well, I couldn't say that those were the exact words.

Q. You would not say that those were the exact words?

A. No, I wouldn't; but it is substantially the same.

Q. Well, you told him how to answer the telegram, anyway, didn't you? A. Yes, sir.

Q. And you never told Mr. Lamborn anything about that, did you? A. We had discussed it.

Q. You told Mr. Lamborn that you were going to wire Mr. King how to answer the telegram?

A. No, not in so many words; we discussed it.

Q. He didn't know whether you had sent this telegram, did he?

A. I really don't know whether he knew whether I had sent it or not.

Q. You don't know? A. No, sir.

Q. Now, when you came back to Salmon City you had some talk with Mr. King about this matter, didn't you, about sending these telegrams?

A. I might have; I expect I did.

Q. You told Mr. King that it was—how Mr. Lamborn had sent this telegram so that you could not intercept it, didn't you?

A. Why, no; I don't remember anything like that.

Q. You didn't tell him that?

A. No, I don't think I—

(Testimony of John G. Richards.)

Q. You told him that he had sent it so that you could not help it, and that is the reason why you went down to the office and sent this one?

A. No. That wasn't sent until the next day.

Q. Well, what was your object in sending this?

A. Because Mr. Lamborn and I had practically decided we wanted the property, and we had talked over the matter, and he had decided, as well as with me, to return to Salmon, Idaho.

Q. What for?

A. To see if we could make any difference in the transaction—in the deal.

Q. Well, what did you want to send that telegram for, if you understood that you and Mr. Lamborn were going to Salmon City?

A. Well, I don't know just what the idea was.

Q. Just tell me your object in sending that telegram, if you will, please?

A. Well, I'll tell you: I know that my main object was to come on to Idaho and see Mr. King before we closed the deal. That was the main object—to get out West again.

Q. Well, but you had telegraphed Mr. King a specific inquiry as to whether or not he would accept certain terms?

A. Well, we sent several telegrams.

Q. And Mr. Lamborn had dictated that particular telegram himself?

A. And I knew that Mr. King wouldn't understand it. He told me he didn't understand it.

Q. You knew—

(Testimony of John G. Richards.)

A. Yes, and he told me he didn't understand it.

Q. Well, didn't you understand it?

A. How is that?

Q. Didn't you understand it?

A. I don't know as I had a full understanding of it.

Q. Well, if you didn't think Mr. King would understand this telegram, why didn't you say so to Mr. Lamborn when he sent it? A. I did.

Q. You did say so to him? A. Yes, sir.

Q. But still you didn't tell him that you were going to send one?

A. No—I didn't intend to until the next day.

Q. Did you see Mr. Lamborn the next day?

A. Yes, sir—no; I don't think I did see him the next day.

Q. Well, will you say that you didn't?

A. I will say that I didn't see him the next day.

Q. Well, did you see him at all after that?

A. Yes, sir.

Q. You never did inform him that you had sent that telegram?

A. I don't know whether I told him or not. I might have, and I might have not.

Q. All that you were obligated for were these notes, was it? A. And $1,000.00.

Q. And if this deal had gone through you would have had enough money to have paid your notes and had $20,000.00 over it, wouldn't you?

A. Mr. Lamborn—we were getting bonds in return as a matter of commission.

(Testimony of John G. Richards.)

Q. How? A. We were getting bonds.

Q. Who was?

A. Well, I was to have gotten $22,500.00, in addition to the bonds I was to get for $10,000.00, and Mr. Lamborn was sharing this.

Q. Well, the $10,000.00 was all that you was to be in, in cash, wasn't it? A. Yes, sir.

Q. And you were to get $22,500.00 worth of bonds, and enough cash, I suppose, to take care of this?

A. No; I was getting no cash.

Q. You was getting no cash? A. No.

Q. How many bonds were you getting, then?

A. $22,500.00.

Q. Well, that only made you $22,500.00 commission?

A. Well, that's what I mean. I was getting in addition to that $1,000.00, or $10,000.00 in bonds for the $1,000.00 that I was putting in.

Q. Making $32,000.00 in bonds altogether that you were getting? A. Yes, sir.

Q. These bonds to be a mortgage on the whole property? A. Yes, sir.

Q. And you would be in on this property $10,000.00, in return for which you would be getting $32,500.00 bonds of the company and a quarter interest in the property?

A. Yes, sir; but I say, on this $22,500.00 I was sharing that with Mr. Lamborn.

Q. How?

A. I was sharing the $22,500.00 with Mr. Lamborn.

(Testimony of John G. Richards.)

Q. You were? A. Yes, sir.

Q. When did you make that agreement with Mr. Lamborn? A. I didn't make any agreement.

Q. Then, why were you sharing it with him?

A. Any more than I told him we were in on the transaction on an equal basis, and that he was entitled to his ¾ of these bonds that was returned to me by Mr. King.

Q. And you were going to give him ¾—

A. —of the commission bonds.

Q. —of the $32,500.00 bonds?

A. No—of the $22,500.00 bonds.

Q. Then Mr. Lamborn was getting a commission out of the sale, too?

A. Well, he was getting his ¾ of those bonds.

Q. Well, Mr. Lamborn was to get $32,500.00 in bonds besides, wasn't he?

A. I don't know. I should think he was getting $30,000.00.

Q. How?

A. I should think he would be getting $30,000.00.

Q. Were you—yes, $32,500.00—were you to get any part of those bonds?

A. Of Mr. Lamborn's?

Q. Yes. A. No, sir.

Q. Still, you were giving him a part of yours?

A. I was giving him part of these bonds that Mr. King was giving me as commission.

Q. Now, did Mr. Lamborn understand that you were going to give him two-thirds of those $22,500.00 in bonds?

(Testimony of John G. Richards.)

A. He understood that he was sharing with me.

Q. Did he understand he was going to get two-thirds of those $22,500.00 bonds?

A. He understood he was getting his *pro rata.*

Q. Did Mr. Lamborn know you were going to get those $22,500.00 of bonds? A. At what time?

Q. When this agreement was signed?

A. No.

Q. He didn't know you were going to get them at all? A. No.

Q. Well, then, he couldn't have known anything about it, could he? A. No.

Q. When was it you told him?

A. After securing a contract with Mr. King.

Q. How?

A. After securing a contract with Mr. King.

Q. After this contract was signed—this original contract?

A. Yes; at the time we paid the $7,500.00.

Q. After that? A. Yes, sir.

Q. How long after? A. I don't remember.

Q. You don't recollect? A. No, sir.

Q. Now, when was it, after this agreement was executed, that you again came back to the Salmon River country?

A. I came back—after taking Mr. Lamborn out to the railroad, I came back within a week.

Q. And this agreement was executed on the 30th day of July, 1908, wasn't it?

A. I believe so.

Q. Now, you say you and Mr. Lamborn came in

(Testimony of John G. Richards.)
there on Sunday? A. Yes, sir.

Q. And went up to the mine on Sunday afternoon?

A. Yes, sir. We was there until the following Wednesday.

Q. Will you say that the 30th wasn't on a Friday?

A. I will say that it was a Wednesday—the last Wednesday in July. I don't know the exact dates.

Q. Are you certain it was Wednesday?

A. Yes, I am certain it was Wednesday that we returned. It might have been the 31st; but it was the following Wednesday after Mr. Lamborn got there.

Q. Don't you recollect of going out to Mr. Shoup's on a picnic on a Wednesday?

A. No, sir; we went there on Tuesday.

Q. This contract was signed on the 30th—on the day it bears date? A. Yes.

Q. And when did you leave there after the contract was signed?

A. In the evening I went up to Mr. Sharkey's ranch.

Q. Now, you went up to the mine on Sunday?

A. Yes.

Q. You and Mr. Lamborn? A. Yes, sir.

Q. Mr. King wasn't along?

A. No, sir; but we saw him there.

Q. And who did you see at the mine?

A. I don't remember who we saw.

Q. You saw Mr. Miller?

(Testimony of John G. Richards.)

A. I think we saw Mr. Miller, and there might have been some workmen there.

Q. You made some inquiries of them about the mine, in a general way?

A. Oh, we talked about the mine, yes.

Q. You were there for the purpose of looking this mine over? A. Yes, sir.

Q. With a view to purchasing it?

A. Yes, sir.

Q. And with that purpose in view you talked with some of those who were there at the mine?

A. I talked with them, yes.

Q. And went in the mine?

A. I think we went in the mine, Sunday afternoon.

Q. You went in farther than Mr. Lamborn, didn't you? A. Yes.

Q. You went down to the end of the tunnel, didn't you—the old tunnel? A. No, sir.

Q. How? A. No, sir.

Q. You didn't? A. No, sir.

Q. How far did Mr. Lamborn go, then?

A. He went into the breast of the new tunnel.

Q. And you looked the situation over there the best you could? A. Yes.

Q. There was nothing to prevent you seeing anything that might have been seen?

A. In the new tunnel?

Q. Yes. A. Nothing.

Q. How? A. Nothing at all.

Q. Mr. King wasn't there?

(Testimony of John G. Richards.)

A. No, I don't think Mr. King was with us.

Q. The employees of the mine were there?

A. I don't remember whether the men were working that day or not.

Q. Mr. Miller was there?

A. Yes, Mr. Miller was there.

Q. And you asked him such questions as appeared to you to be proper in investigating about the mine?

A. Yes.

Q. And he showed you what he could?

A. He showed us the mine, yes; that is, the entry.

Q. And you asked him some questions about what they had been doing? A. Yes.

Q. And the extent of the works? A. Yes.

Q. Who did you meet in Salmon City while you were there? A. Why, I don't remember.

Q. You met quite a number of citizens there?

A. Yes, sir.

Q. Talked with them about the fact that you were contemplating the purchase of this mine?

A. No.

Q. How? A. No.

Q. Nobody?

A. I might have mentioned it to one or two, but not generally. In fact, I seriously doubt if there was any one in Salmon who knew what my business was there, except Mr. King.

Q. You think there was nobody there but him?

A. I doubt if there was a soul there knew it outside of him and myself.

Q. Why did you want Mr. Lamborn to come to

(Testimony of John G. Richards.)

Salmon City?

A. Because I wanted him to meet Mr. King, and see the general lay of the country.

Q. And see the mine?

A. And see the mine.

Q. And investigate for himself?

A. Yes—as much as he could.

Q. So that you didn't want to be responsible to Mr. Lamborn for any statements that you had made that might not be in accordance with the fact?

A. Well, it was more satisfactory for him to be there.

Q. Mr. Lamborn, in fact, insisted on coming out, didn't he? A. No, sir.

Q. He didn't? A. No.

Q. Was he willing to take your word for it?

A. Yes, sir.

Q. Your word entirely for it?

A. Yes, sir.

Q. You told Mr. Miller that Mr. Lamborn had left the matter to you, but that you were going to have him come out there and see for himself?

A. Yes, sir.

Q. And that was your purpose in bringing Mr. Lamborn there? A. Yes.

Q. So that he could see for himself?

A. I wanted him to meet Mr. King and let them talk the deal over.

Q. Now, you knew that all the coal that had been sold from this mine had been sold there locally about Salmon City, didn't you?

(Testimony of John G. Richards.)

A. Except the tonnage for this mine, outside.

Q. How far was it out to the Copper Queen mine?

A. I don't know. It was on the divide—well, it must be forty miles, or maybe not so much,—between thirty and forty miles.

Q. Who was Mr. King selling coal to in and around Salmon City? A. The citizens.

Q. Do you mean to say you didn't inquire something from the citizens—something about the character of this coal? A. Yes.

Q. How? A. Yes.

Q. Did you, or did you not? A. I did.

Q. You did? A. Yes.

Q. You saw the coal burned? A. Yes.

Q. Mr. Lamborn saw it burned?

A. Yes, sir.

Q. And you were up to the mine and saw it taken out?

A. Yes; we saw the work in the new entry.

Q. You saw them taking out coal?

A. Yes, sir.

Q. And bringing it down to Salmon City, and selling it to the various inhabitants of that place, did you? A. Yes, sir.

Q. And you talked with these people to whom this coal was sold, about how it burned, and what they paid for it, etc.? A. Yes, sir.

Q. And that was in pursuance of your plan to investigate this mine, wasn't it? A. I was—

Q. Wasn't that—

A. Yes; I was getting some information about the

(Testimony of John G. Richards.)

burning of it.

Q. You were getting what information you could?

A. Yes, sir.

Q. Now, you came back, after you had seen Mr. Lamborn off at the station, to Salmon City?

A. Yes, sir.

Q. And how long did you remain continuously in Salmon City from that time?

A. Well, I left for Texas about the latter part of September.

Q. You were, of course, frequently at the mine during August and September? A. Yes.

Q. And did you have anything to do in regard to the property there, as to its management?

A. Yes; I was there directing the permanent work.

Q. You were directing the permanent work?

A. Through Mr. Miller, yes.

Q. As a matter of fact the work was turned over to you? A. Yes; the—

Q. And you had what might be called the superintendency of this property, didn't you?

A. Yes.

Q. Its general management? A. Yes.

Q. And you were in daily conference with Mr. Miller, who was the practical man in charge of the work? A. Yes, sir.

Q. And were frequently in the mine?

A. Yes.

Q. And saw the course of development?

A. Yes.

(Testimony of John G. Richards.)

Q. Now, would you say that you were there practically every day, up until the time that you left in September?

A. Well, no; there was a part of the time I was down the river, looking at other mines.

Q. But you were there a great deal, at any rate?

A. Yes, I was there.

Q. And then you went away about the 20th of September, and returned to this mine at what time?

A. About the middle of November.

Q. About the middle of November?

A. Yes, sir.

Q. Did you resume your position then as General Manager? A. Yes, sir.

Q. And, of course, up until the first of January were frequently around this mine?

A. Yes.

Q. And noticed its general condition?

(No answer.)

Q. Now, you were observing its output, of course, from day to day, as General Manager?

A. Yes.

Q. And what time was it that you got to looking over these stubs?

A. As soon as I found them.

Q. When was that?

A. The latter part of January.

Q. That was the first time that you suspicioned that the output might not have been as much as Mr. King stated it was?

A. I was afraid that it wasn't—I suspicioned—

(Testimony of John G. Richards.)

yes, I suspicioned before that it was going to fall short.

Q. How much short?

A. Well, it seemed to me like half as much as Mr. King represented.

Q. You thought that you would not be able to do more than half as much as he said that he did?

A. Yes.

Q. Now, when was it that you first suspicioned this?

A. Well, along the middle of the month, or a few weeks before.

Q. The middle of what month?

A. Of January.

Q. You never had suspicioned it before that?

A. No; I didn't—

Q. You worked along there from month to month, as General Manager of that mine, watching its output from day to day, and it never occurred to you to suspicion that until in January?

A. I couldn't understand why we were not making the output which we should. I recognized the fact that our output was falling considerably short; but Mr. King—

Q. Well, when was it you recognized that?

A. Well, along in December.

Q. You were not attempting, while you were General Manager there, to increase the output, particularly, were you?

A. I solicited from the citizens; but my main object was in driving the main tunnel ahead, and get-

(Testimony of John G. Richards.)
ting it on a permanent paying basis.

Q. Yes; that was your main object?

A. That was my main object.

Q. You were not trying to force the output of the mine?

A. No. I figured that if we maintained the output as Mr. King was supposed to have made it, that that would be very good.

Q. And you were trying to put the mine in shape so that you could get the coal opened up, and the mine in such shape that it would be of a permanent benefit to the mine, rather than a present benefit to the owners? A. Yes, sir.

Q. And that was your object when you were Manager? A. Yes, sir.

Q. And still, with that object in view,—

A. That was the main object.

Q. And still, with that object in view, you think it came up to about half of what Mr. King represented it to be, do you?

A. I didn't think it was going to be half. I thought we would have to do at least—

Q. Didn't you say a moment ago that you thought it was about half?

A. No—I thought we would do well if we did make half.

Q. Well, you thought it was running about half, didn't you?

A. No, I didn't think it was running half.

Q. You didn't?

(Testimony of John G. Richards.)

A. No, I didn't think it was.

Q. Well, why did you so state a moment ago, if you did so state?

A. Well, I didn't put it exactly that way, Mr. Clark.

Q. Well, about how much did you think it was running?

A. Well, I don't remember, but less than half.

Q. How much less than half?

A. It didn't seem to me like we were running much more than a third, if that much. I had no relative figures to base—

Q. You had no figures?

A. That is Mr. King's tonnage for those same months the year before. I had nothing to make a comparison.

Q. Well, you had nothing to make a comparison with? A. No.

Q. Didn't you supply all of the people who wanted coal, in and about Salmon?

A. Yes.

Q. And when was it that you left the mine as General Manager?

A. Well, when this difficulty came up—about the latter part of March.

Q. About the latter part of March?

A. Yes.

Q. As a matter of fact, you didn't make much effort that year to increase the tonnage from that mine, did you?

A. Well, I made a solicitation from those who

were not using it.

Q. You became dissatisfied in January, didn't you? A. How is that?

Q. You became dissatisfied with this transaction in January? A. Yes, sir.

Q. And you concluded that you would throw this deal up?

A. I was satisfied that we would be better off with our money than—

Q. And you concluded that the deal would be called off? A. Yes, sir.

Q. And, of course, after that time you didn't pay much more attention to the permanent development of the mine, did you? A. No, sir.

Q. And in fact didn't take much more interest in it after that, did you?

A. No, sir, not after the first of April.

Q. Then you worked there in the permanent benefit of the mine from along in August until the fore part of January?

A. Yes. No—we worked later than that; that is, we kept looking after it until the time Mr. King agreed to pay our money back.

Q. Yes; but you didn't take much interest after that, did you? A. Up to that time.

Q. After the fore part of January?

A. After the latter part of January—after the middle of February.

Q. The mine laid practically idle the balance of that season, didn't it?

A. Well, the regular tonnage was always taken.

(Testimony of John G. Richards.)

Q. Was there a cave-in, in the old Pollard workings, when you had the management of it?

A. A cave-in?

Q. Yes. Was it caved in so that you couldn't get at this breast of coal in the old workings?

A. It was, up to the latter part of January; that is to say, it was obstructed so we couldn't get in.

Q. So that in your operation of the mine you didn't take any coal from the old Pollard workings, did you?

A. Yes; we raised up to a pillar—we took out a pillar that Mr. Pollard had left.

Q. But that was all?

A. That was practically all, yes.

Q. Then, you didn't have the old workings opened up so that you could go in there and take the coal out from the old workings, did you?

A. No, except this one pillar.

Q. Do you know as a matter of fact whether those old workings have since that time been opened?

A. They have been opened so that we can get into the old breast.

Q. If you had been able to work on the old breast as well as the new breast, wouldn't the output of your mine have been materially increased?

A. I think not.

Q. You don't think so? A. No.

Q. Why not?

A. Because we supplied all the demand.

Q. Well, that isn't the question. You say you supplied all the demand; but if there had been an

increased demand, then couldn't the output of your mine have been materially increased?

A. Oh, if we had had the demand we could have supplied more tonnage, yes.

Q. Then, the reason for not supplying more tonnage was because there wasn't sufficient demand for it? A. No, sir.

Q. How? A. No, sir.

Q. You say that is not the reason?

A. No—I say that is the reason that we didn't supply more, is because the people didn't want more.

Q. And the reason you didn't furnish more is because the people didn't want more? A. No.

Q. It wasn't because the mine wouldn't produce it?

A. We could have taken out more, yes. We could have put on another shift; in fact, some of the time we did put on another shift.

Q. And you never opened up that old breast?

A. Well, it would have been difficult—

Q. Well, it has been done since that, hasn't it?

A. Yes. After we got in for the proper distance—

Q. And the bulk of the coal that that mine has since produced comes from the old breast, don't it?

A. I don't know.

Q. You don't know? A. No, I don't know.

Q. You would not say that is not true?

A. But I will say that it could be true.

Q. How?

A. I will say that it could be true.

(Testimony of John G. Richards.)

Q. Yes, it could be true. Then, if you had had the demand, and attempted to increase the output, in all probability you could have brought it up to the 2,300 or 2,400 tons, which Mr. King said it did produce, couldn't you?

A. Well, I expect we could if we had had the demand; but it would have required a heavier force.

Q. Then, when Mr. King stated that the mine would produce 2,300 or 2,400 tons, he was stating what was literally true, wasn't he?

A. How is that?

Q. When Mr. King said this mine could and would produce 2,300 tons, he was stating what was literally true, wasn't he?

A. Mr. King stated to me that the mine had produced 2,300 tons, or more, and could show an increase for another year.

Q. Well, if he stated that it would produce 2,300 tons— A. He stated that it had.

Q. If he did state it—

A. He stated that it had.

Q. Well, you don't say that he stated it would do it?

A. He said that it would show an increase.

Q. Well, it would have shown an increase if it had been properly worked, wouldn't it?

A. If we had had the demand that Mr. King said that he had had the year before, we would have showed an increase, yes, sir.

Q. Over 2,300 tons?

A. Over 2,300 tons.

(Testimony of John G. Richards.)

Q. So that there was nothing the matter with the mine; it was simply a matter of demand, that's all? A. Yes, sir.

Q. There was plenty of coal to produce everything that Mr. King said it would, if there was enough people to burn it?

A. There is plenty of coal, such as it is.

Q. And you saw it burned?

A. I saw it burned.

Q. And Mr. Lamborn saw it burned?

A. Yes, sir.

Q. And you thought it burned pretty well, didn't it?

A. I thought it burned well, but it created a good deal of ash.

Q. In other words it looked good to you; so well that you were willing to invest your money in it as a coal proposition? A. Yes, sir.

Q. This particular winter was a very mild winter up there in that section of country?

A. The latter part was mild.

Q. And the month of December was mild, wasn't it?

A. December was fairly mild—the latter part was fairly mild.

Q. And weren't you behind in your orders while you were General Manager of that mine?

A. I don't think there was but one time when we were crowded on our orders.

Q. There was one time when you were crowded on your orders; when was that?

(Testimony of John G. Richards.)

A. Well, I don't remember just what time of the year, but it must have been in December, or November.

Q. What were you selling this coal for?

A. At $6.00 per ton.

Q. Mr. Lamborn thought that price ought to be raised, didn't he? A. Yes, sir.

Q. Do you say that you figured that you might make or could make a profit of $3.00 a ton out of this coal? A. Yes, sir.

Q. And that Mr. King thought you could make a profit of $3.00 a ton on it? A. Yes, sir.

Q. Well, now, why couldn't you make that profit?

A. Because we didn't have the demand.

Q. Because you didn't have the demand?

A. Although it was a greater demand than—we had more customers than Mr. King said he had.

Q. But you don't know whether they took as much coal or not?

A. I think those who burned coal used about the same tonnage.

Q. Well, do you know they did? You don't know anything about it, do you?

A. In some cases I do, yes.

Q. Well, at any rate, Mr. Richards, if you had had an increased demand you could have made $3.00 a ton on this coal, selling it at $6.00?

A. If we hadn't had to have sorted it.

Q. How?

A. If we hadn't had to have sorted it; but we didn't make $3.00 a ton.

(Testimony of John G. Richards.)

Q. Well, when you had to sort it, how much did you make?

A. Well, the sorting was that much more expensive. We had to sort it all.

Q. How much profit was there in it?

A. There was none. The receipts practically balanced the expense.

Q. Don't you think some of that might have been due to mismanagement?

A. I don't think so. So much work had to be performed on the coal.

Q. You, of course, don't know how much coal that mine has produced this last winter, do you?

A. No, I don't.

Q. Well, the coal was good coal, wasn't it, after it was sorted? A. It was not.

Q. What? A. It was not.

Q. Wasn't it? A. No, sir.

Q. When did you come to that conclusion?

A. Well, I knew it was not first-class coal when we were in the breast; we all knew that, but then we expected that the increase—Mr. King had represented that the breast was clean and unsortable coal, and that is the point, when we were working clay—

Q. Well, you knew that this was not good coal, you say?

A. Yes, as we came to it we recognized it.

Q. And you had seen this old breast before that?

A. Before the transaction?

Q. Yes?

A. No, sir, I hadn't seen ahead of the breast.

(Testimony of John G. Richards.)

Q. Didn't you say you saw it in 1906, when you first went in the mine?

A. I had seen the old Pollard workings.

Q. Yes; the old breast was in there, wasn't it?

A. Well, that was approaching the place that Mr. King spoke of.

Q. And he said that this in the old breast would not need to be sorted? A. Yes.

Q. He said that?

A. Yes—the farthest point that he had mined from.

Q. And you couldn't go in there because it was bad air? A. Bad air, and caved.

Q. Did you ask Mr. Miller if that were true—if this didn't have to be sorted?

A. I don't remember what Mr. Miller did say. Mr. Miller was noncommittal in all his conversation.

Q. Well, as a matter of fact you had seen that coal there from year to year that was being produced from that mine, hadn't you?

A. No, sir, I hadn't.

Q. You hadn't? A. No, sir.

Q. You had never seen any of it before?

A. At the mine?

Q. That was being burned, that was being produced from that mine?

A. Yes, I had seen it.

Q. You knew that all that coal had to be sorted, didn't you?

A. From Mr. Pollard's workings?

Q. Yes?

(Testimony of John G. Richards.)

A. I didn't know that he was sorting it, no.

Q. Didn't you ask him if he ever sorted it?

A. No, sir, I didn't ask him.

Q. Well, you understood a large increase in the demand would come by this railroad coming in there, didn't you? A. That wasn't the—

Q. Didn't you expect that?

A. We would expect it, yes; but that wasn't our consideration.

Q. And that was one of the main considerations when you bought the mine, was the fact that this railroad was coming in there, wasn't it?

A. We didn't know the railroad was coming.

Q. Well, you had a pretty strong suspicion, didn't you?

A. That wasn't why we purchased the mine.

Q. You didn't expect to make any immediate profits out of this mine, did you? A. Yes, sir.

Q. Oh, you did? A. Yes, sir.

Q. You expected to make immediate profits?

A. Immediate.

Q. How much?

A. Well, we expected to make six per cent on our investment.

Q. You figured that you could do that if it produced 2,300 tons? A. If Mr. King was correct.

Q. If it produced 2,300 tons, you figured you could make six per cent on your investment?

A. Yes, sir.

Q. And if it produced 2,300 tons of the coal that it had been producing, you could make that same six

(Testimony of John G. Richards.)

per cent, couldn't you?

A. We could if we didn't have to sort it. If we could make $3.00 a ton we could, yes.

Q. Well, you knew that all of this coal that was coming out of the mine when you were up there had to be sorted, didn't you? A. Yes, sir.

Q. You knew that, didn't you?

A. Yes, sir.

Q. And you expected to sort it?

A. We expected to sort—to pick it over, yes, sir.

Q. And you didn't figure on anything else, did you, when you made this purchase; that is, that this was sortable coal—this at the breast—and you knew all of that coal in that mine had to be sorted?

A. No, sir. Mr. King told us it was clear and unassortable coal, and we took his word for it, and Mr. King told me so.

Q. You came out there to investigate, and then concluded that you would take Mr. King's word for this important point of this transaction, did you?

A. Yes, sir. Mr. King's word was good enough for me.

Q. Well, then, why did you come out to investigate?

A. Well, we wanted to see what we were getting, and to see Mr. King.

Q. Mr. King's word was good enough for you; but you thought you had better investigate?

A. Well, yes, to see how we could operate—

Q. And with that object in view you did investigate, didn't you? A. So far as we could.

(Testimony of John G. Richards.)

Q. Now, in this coal mine was included 480 acres of land that adjoins the village of Salmon—patented land? A. Yes.

Q. This sale, then, included 480 acres of patented land adjoining the townsite of the City of Salmon, and this coal mine? A. Yes, sir.

Q. This patented land is of very considerable value, isn't it?

A. It has an agricultural value, yes.

Q. Of approximately $100.00 an acre, doesn't it?

A. I shouldn't think so.

Q. You wouldn't think so?

A. No. I would hate to give $100.00 an acre for it.

Q. Well, what would you give?

A. Well, I don't know. I would have to consider what I might be able to get out of it in the way of produce—agriculturally.

Q. Don't you know as a matter of fact that land of similar character, and not so good, in that immediate neighborhood, was selling and is now selling for $100.00 an acre, and more?

A. No. I am not familiar with the prices. I understand the prices are very high, though.

Q. They are very high in there now, aren't they?

A. I understand they are.

Q. And that is first-class agricultural land, isn't it? A. Well, I should hardly think so.

Q. And fruit land?

A. It is good fruit land. It would probably be better for fruit than agriculture.

(Testimony of John G. Richards.)

Q. And that is more valuable than for agriculture, isn't it? A. It is very valuable land.

Q. Did you ever see any reports made by experts as to this mine? A. I have seen, yes.

Q. Did you see any prior to the time that you purchased it? A. No, sir.

Q. You didn't? A. No.

Q. You knew experts had examined it?

A. No, nothing more than the State Mine Inspector.

Q. The State Mine Inspector?

A. I believe that was the only one. I had none reporting on it.

Q. Did you see his report?

A. I saw his statement in his Mine Report, yes—the State Mine Report.

Q. That was to the effect that this was a very promising mine, wasn't it?

A. Well, it didn't pass on the prospects of the mine so much as it discussed the probable extent of it.

Q. And was that a favorable report?

A. To that extent it was; that it was continuous—the vein formation might be continuous.

Q. And who was that State Mine Inspector?

A. Robert Bell.

Q. Did you inform Mr. Lamborn as to his report?

A. Yes, sir.

Q. That was before you made the purchase?

A. I might have—I just mentioned that he had made this report to this extent.

(Testimony of John G. Richards.)

Q. That was before you made the purchase?

A. Yes, sir.

Q. You knew that Mr. King had just purchased this property shortly before, didn't you? In fact, he had just purchased it when you first went with him to the mine?

A. Yes; he was just assuming charge, I believe, the first of September.

Q. Yes; he had just purchased the mine. He was running a bank down there in Salmon City?

A. Yes, sir.

Q. He didn't pretend to you to be a coal expert, did he? A. No.

Q. He was merely such as any other private citizen as might know little or nothing about coal properties? A. Yes, sir.

Q. In fact, he wanted your opinion on it, didn't he?

A. He wanted my opinion especially in regard to what I thought of its extent; whether it was permanent or not.

Q. Did you give him that opinion?

A. I did.

Q. And what did you tell him?

A. I told him I thought it was permanent.

Q. In other words, you were acting as an expert to Mr. King, weren't you?

A. No, not as a coal expert, for I know—

Q. But you were acting as an expert on mines?

A. Well, as having a judgment on mines I was, yes.

(Testimony of John G. Richards.)

Q. Well, are you acquainted with coal veins, and what indications are necessary in order to indicate that the veins are permanent?

A. No, not especially with coal veins.

Q. Well, what was there about this that made you think that it was permanent?

A. Starting from the portal of the tunnel, and following in on the strike of the vein, we found that it continued, as we went in and gained way, or depth; that this vein was continuous.

Q. It looked better all the time the farther in you got?

A. From the portal to the place where I first saw it, where Mr. Pollard was working, there was quite an excellent change for the better, yes.

Q. All those things together indicated to you that this was a permanent proposition? A. Yes.

Q. And that, of course, would be a very valuable thing, when taken in connection with the purpose to buy the mine, wouldn't it? A. Yes, sir.

Q. The question of its permanency?

A. Yes, sir.

Q. And Mr. King wanted your opinion on that?

A. Of the permanency, yes, sir.

Q. And he wanted to find out whether or not you thought he had made a good buy?

A. Yes, sir.

Q. Did he tell you what he had paid for it?

A. I believe that he did.

Q. What was it?

A. Why, he said he paid $30,000.00.

(Testimony of John G. Richards.)

Q. He said he paid $30,000.00 for it?

A. But I am not sure,whether it was at this time —the first time I met him in regard to it.

Q. And Mr. King wrote you that he had put on a mule, and was putting the property in better shape, so that it could be worked better? A. Yes.

Q. You found all that to be true when you returned? A. Yes.

Q. In fact, every representation that Mr. King made to you about the surface matters there, so far as you could see when you and Mr. Lamborn came, were literally true?

A. The improvements, yes.

Q. Then, there were just two misrepresentations of which you complain: One was the question of the output of the mine; and the second was that he said that this ore would have to be sorted—or, it wouldn't have to be sorted?

A. And the representations that the upper strata of coal in the new entry being the same as the strata from which they had mined the year before.

Q. Now, those were the only misrepresentations of which you complain?

A. I believe those are the three main—

Q. Yes. In other words, you say that he represented that this mine had produced 2,300 tons, and would do so again? A. Yes, sir.

Q. Now, that was one misrepresentation he made. The second is, that you say he said that this breast of coal in the old workings would not have to be

(Testimony of John G. Richards.)
sorted? A. Yes, sir.

Q. And that is the second one?

A. Yes, sir.

Q. Do you know whether that coal has to be sorted or not? A. I do.

Q. When did you find that out?

A. When we got in there.

Q. When was that?

A. About the 24th of January, 1908.

Mr. RICHARDS.—1908?

WITNESS.—No—1909.

Mr. CLARK.—Q. 1909? A. Yes, 1909.

Q. And this upper strata, you say he said that was the same as what?

A. The coal from which he had mined was the same as the upper strata of the vein in the new tunnel.

Q. That is, the coal in the old breast—

A. Yes.

Q. —was the same as the upper strata in the new tunnel? A. Yes.

Q. Well, now, do you mean to say that the upper strata in the new tunnel didn't have to be sorted?

A. There was no coal there.

Q. How? A. In the new tunnel?

Q. Yes?

A. It wasn't coal; it was entire waste—slate and clay.

Q. Well, then, the coal in the new breast was better than he represented it to be, wasn't it?

A. No. He didn't have to make any representa-

(Testimony of John G. Richards.)
tions as to the new breast; we could see that.

Q. But he said that the old breast, the upper strata was the same as the upper strata in the new breast; is that right? A. Yes, sir.

Q. Now, what is the difference?

A. The difference is that the strata in the lower portion of the new breast is the same as the lower strata in the—in his workings; and that the upper strata in the new breast was waste, the same as it was above the strata of coal from which he mined the year before.

Q. Now, Mr. Richards, that is just as lucid as mud to me. I don't know whether I am dense or not. Now, I wish you would explain that again.

A. Mr. King stated that the upper strata of the new entry was the same as the mine—as the vein from which he had mined in the old works—the old face.

Q. Now, you say the upper strata in the new breast didn't amount to anything, but was waste?

A. It was entire waste.

Q. And that he said that this upper strata, which was entire waste, was just the same as the lower strata in the new breast—the old breast—as the strata from which they had mined? Then he represented to you that the strata from which they had mined in the old breast was absolute waste?

A. In the new breast.

Q. How? (Laughter.)

A. What was meant, Mr. Clark, was that the upper portion of the vein in the new entry, which

(Testimony of John G. Richards.)

showed in the new entry to be waste, had increased in quality until at the breast from which Mr. King had mined the year before it was good coal—clean and unsortable coal.

Q. Well, I think I can perhaps intelligently understand that, Mr. Richards. That is the first time that I have been able to grasp it. In other words, he told you that the upper strata in the old breast, which had been the same as the upper strata in the new breast, had gotten better to such an extent that it could be mined for merchantable coal?

A. Yes, sir.

Q. I think we can understand that. Now, how wide was this upper strata?

A. Well, what we could see of it in the new breast was six or seven feet.

Q. Six or seven feet?

A. Yes, sir; possibly not seven, but approaching six, all right.

Q. Now, when you got into the old breast and found what there was there, what did you find?

A. We found a room there that showed a breast of five feet, or about five feet, of this coal.

Q. Horizontal, or—

A. Well, the thickness of the vein.

Q. It was about five feet?

A. About five feet, yes.

Q. And how high was it up and down?

A. Well, the thickness of the coal vein would represent the height.

Q. Of the tunnel?

(Testimony of John G. Richards.)

A. Of the room. Of course, the room was broken. I suppose it might have been six feet.

Q. Well, now, there was five feet of thickness there, wasn't there? A. About that, yes.

Q. Of coal? A. Yes.

Q. And how many stratas was it in?

A. Oh, I couldn't say as to the number of stratas; there was a great many stratas.

Q. And it was just about the same kind of coal as you met with in the new workings?

A. Yes; the lower portions might have increased a little in value, not much. It wasn't as large, I think, as we had gone through a couple of hundred feet back.

A. Well, it was a better vein for the purpose of producing coal, wasn't it?

A. It was a very good vein from which to mine coal.

Q. And you could produce more coal from that vein than you could from the new workings, which you had mined out?

A. Well, the new workings, we were simply driving a tunnel—we were just simply driving a tunnel.

Q. Well, you couldn't have produced much more coal from it? A. Sir?

Q. Did you ever produce any coal from it?

A. Not exactly from that one place. We had raised the room to go in there, just in front of it. We were within a few feet of it when I was last in the mine.

Q. You were within a few feet of it?

(Testimony of John G. Richards.)

A. Yes, sir.

Q. You hadn't gotten up to it?

A. We were up to the same coal, yes.

Q. But you hadn't gotten up so that you yourself saw the breast of the old workings?

A. Oh, yes. We made an opening there; but we didn't stope any coal through. I was in there repeatedly.

Q. Therefore there was one place where you might have gotten coal, and a place where you didn't get any coal while you were operating?

A. Well, we had to raise in there.

Q. Well, you didn't do it, anyway?

A. No, we didn't mine from there.

Q. And you might have got more coal from that place than any other place in the mine?

A. Yes, sir.

Q. Upon how many places were you working?

A. Well, we kept driving the main entry, and we worked from a room off from the main entry, back from the breast of the entry—a slope we would run up.

Q. Then, you were all the time working in the face of this new tunnel?

A. That was always being worked on; and then we were taking coal out from the pillar we had raised to.

Q. But the bulk of the coal was taken from the face of this new tunnel?

A. No, not from the face. The bulk of the coal was taken from the rooms that we made and raised

(Testimony of John G. Richards.)
into after we got in there.

Q. But how far did you go in?

A. I think about 625 to 640 feet.

Q. Well, while you were driving this 625 feet, all the coal was taken from this tunnel, wasn't it?

A. No, not all of it.

Q. How much was taken from any other place?

A. Well, I don't know just the point that we raised to this pillar, but it was probably 400 feet.

Q. After you got in 400 feet you raised to this pillar? A. Yes, sir.

Q. And for the 400 feet that you were going in, all of it was taken from the face of these new workings? A. Yes, sir.

Q. How long were you, in driving that 400 feet?

A. I forget just how long; but we must have been there—we must have gotten there in December, before we raised up to this pillar.

Q. And it was along in December some time that you raised up to this pillar? A. Yes, sir.

Q. And all of the output of the mine up until that time was taken out of the face of this new tunnel that you had seen? A. Yes.

Q. And from some time in December—about what time in December would you say?

A. Well, I wouldn't say—I couldn't say.

Q. Then you took out this pillar, and then went on in the face of the new tunnel?

A. Yes; we kept the face of the new tunnel going all the time.

No. 1913

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

(IN TWO VOLUMES.)

HARRY G. KING and MARIA J. KING, His Wife,
Appellants,

vs.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,
Appellees.

VOLUME II.

(Pages 225 to 482, Inclusive.)

Upon Appeal from the United States Circuit Court for the District of Idaho, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1913

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

(IN TWO VOLUMES.)

HARRY G. KING and MARIA J. KING, His Wife,
Appellants,

vs.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,
Appellees.

VOLUME II.

(Pages 225 to 482, Inclusive.)

Upon Appeal from the United States Circuit Court for the District of Idaho, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

(Testimony of John G. Richards.)

Q. Then none of the coal that was taken out while you were there was taken from the breast of the old workings? A. No.

Q. To which Mr. King, you say, referred you?

A. That Mr. King had said was unsortable coal.

Q. None of it was taken from the breast of the old workings at all? A. No.

Q. Now, where was it that you couldn't see the breast of the old workings?

A. Where Mr. King had done the most of his mining, supplying the trade in previous years.

Q. Well, why couldn't you see it?

A. Because it was caved, and bad air.

Q. Well, could you get around the cave?

A. No.

Q. You had seen this breast of the old workings yourself about the year before, hadn't you?

A. You mean when Mr. Pollard was there?

Q. Yes? A. No, not that part.

Q. Well, when Mr. King took you up there?

A. I had been to Mr. Pollard's workings. It was practically the same room, but not nearly as far in.

Q. You had seen the breast of the old workings, with the exception that it was not so far in?

A. Yes—by several hundred feet.

Q. How near to this breast of the old workings did you take coal, when you were mining the property?

A. The last time I was in the mine they were taking coal then a very few feet in advance of where Mr. King had taken it. That is the room that they had raised up and gone around.

(Testimony of John G. Richards.)

Q. When was that?

A. Why, I believe it was in March.

Q. March, 1909? A. March, 1909.

Q. You never saw any coal taken from the breast of these old workings?

A. No, sir; we never took a pound from there. I saw samples from there, which Mr. King showed me.

Redirect Examination.

(By Mr. RICHARDS.)

Q. I noticed in the cross-examination by Mr. Clark asked you if you had been at Victor. You said you had not. You had reference to Victor, Colorado, that you had been?

A. Victor, Colorado?

Q. Yes, sir.

A. I used to live there. I thought he meant Victor, Idaho.

Q. Now, in speaking of a commission which you state Mr. King had agreed to pay you; what, if any, information did you give Mr. Lamborn relative to dividing that commission with him?

A. After I had received the contract from Mr. King I wrote to Mr. Lamborn that we had an additional amount of bonds coming to us. I don't remember if I stated the exact amount or not.

Q. Is it a fact or not that Mr. Lamborn went in on exactly the same basis as you did?

A. Yes, sir.

Q. (Paper shown witness.) You may state what that is? A. This is a receipt.

Q. Signed by whom?

(Testimony of John G. Richards.)

A. Signed by H. G. King.

Q. Dated when? A. January 1st, 1909.

Mr. RICHARDS.—We offer this in evidence as Plaintiffs' Exhibit I.

Mr. CLARK.—No objection.

Mr. RICHARDS.—Q. You stated on cross-examination that you subsequently notified Mr. Lamborn of this receipt for these bonds, did you?

A. Yes, sir.

Q. How did you estimate the amount of bonds that were coming, as stated in this receipt, as being $22,500.00?

A. If I had sold the property for $80,000.00 I would have received $30,000.00; and we took that ratio in estimating the portion that was coming to me from a smaller sale of the property—a sale of a smaller portion of the property. If I had sold a half interest in the property I would have received $15,000.00.

Q. Instead of $22,500.00?

A. Instead of $22,500.00. As I sold a ¾ interest of the property I received ⅜*ths* of $60,000.00, or the $22,500.00.

Q. Mr. King retaining ¼th under your arrangement? A. Yes, sir.

(At the request of Mr. Richards the Special Examiner marked a certain letter for identification as Plaintiffs' Exhibit "J.")

Q. (Paper shown witness.) You may state what that it?

A. This is a letter to Mr. A. H. Lamborn, New York City.

(Testimony of John G. Richards.)

Q. Dated when? A. March 5th, 1909.

Q. And signed by whom?

A. Myself—"Dick."

Mr. RICHARDS.—I offer this letter in evidence, and especially that portion of it which reads as follows: "I secured an agreement from King in regard to the bonds that will work to our mutual benefit quite materially if I succeed with it and I don't see how it will fail now. I can go more into detail after I discuss the matter with Cowan. But I expect to draw $22,500 in bonds our way." That is simply to show that he notified Mr. Lamborn, is all.

Mr. CLARK.—This is objected to as incompetent and immaterial—a letter written long after the facts and matters alleged in the complaint in this case, and it is merely a self-serving declaration, written by one of the parties plaintiff to the other.

Mr. RICHARDS.—It is merely to show that he notified Mr. Lamborn.

Q. What, if any, secrets did you keep from Mr. Lamborn in reference to your arrangement with Mr. King relative to this coal property?

A. Well, Mr. King or Mr. Lamborn knows the full details.

Q. I asked you what, if any secrets you kept from him?

A. I haven't kept any secrets from him—none.

Q. What, if any advantage did you take or seek to take of Mr. Lamborn, under the arrangement you had of purchasing this property from Mr. King?

A. Not one bit.

(Testimony of John G. Richards.)

Q. Can you give any fuller explanation of what was asked you by counsel relative to an exchange of checks between you and Mr. King, of $2,500.00 each?

A. In reference to the $2,500.00 transaction, I was going to have to borrow some money—I wanted to carry on a transaction at Higgins—and Mr. King informed me that he would loan me whatever money that I desired, and he deposited in the bank at Higgins, Texas, $2,500.00; or rather, I did.

Q. To your credit?

A. To my credit, and I don't know—

Mr. CLARK.—Q. Now, which was that? Did you deposit it, or did he?

A. Well, I don't know. It was $2,500.00 sent to the bank of—that I had—the bank at Higgins. Now, just the details of that transaction I am not clear about.

Mr. RICHARDS.—Q. Well, state whether or not in that transaction there was any injustice done to Mr. Lamborn? A. Not one bit.

Q. In what way, if at all, did it affect the transaction, so far as you and Mr. Lamborn were concerned? A. Not one dollar's worth.

Q. Did Mr. Lamborn understand the situation?

A. I don't think that he did.

Q. At that time? A. At that time.

Q. When you say, as I understood you, that Mr. Lamborn saw this coal burned, I wish you would describe or state how much he saw burned?

A. Why, there was a stove in the office at the coal mine, and we built a fire there on this July day, to

(Testimony of John G. Richards.)
see if the coal would burn.

Q. What kind of coal—selected, or otherwise?

A. Well, it was assorted coal, such as they were sending out to the trade.

Q. You were interrogated about a conversation you had with Mr. Miller, in reference to Mr. Lamborn being willing to take your word. I wish you would explain that.

A. Mr. Lamborn was willing to take my word on the proposition, and leave the whole transaction to me—not even coming from New York.

Q. Did that word that he was willing to rely upon include the statements of Mr. King, or not?

A. They were.

Q. What, if any, information did you give to Mr. Lamborn relative to your qualifications as a coal man?

A. Mr. Lamborn told me he knew nothing about coal, and I says, "I don't know a thing about coal myself."

Q. Now, how did it come that you sent that telegram to Mr. King, requesting the statement from him relative to the quantity of coal produced in the previous 11 months?

A. One of the letters I had received from Mr. King stated that there was about 2,000 tons; and Mr. Lamborn said, "Well, let's know what it is exactly to date," and at his request I sent this telegram asking for the tonnage.

Q. What, if any, deception were you undertaking to play upon Mr. Lamborn by sending the telegram

(Testimony of John G. Richards.)

which you say you sent unbeknown to him?

A. None whatever.

Q. What was your purpose in sending it?

A. So that I could get away from New York and get out to Idaho. I was satisfied we had a good deal, and I wanted to get out here.

Q. You were superintendent of the property, you say for some time. Between what dates were you superintendent?

A. Well, I was in charge of the property from the time we entered into this contract (about the first of August) until we decided to not carry the deal any further.

Q. What information had you during that time relative to the condition of the breast which you was not able to see at the time you and Mr. Lamborn and Mr. King were up there?

A. Mr. King said that there was five feet of clean, unsortable coal in the breast.

Q. What do you mean by "unsortable"?

A. Well, that it didn't require sorting.

Q. Well, what information did you have during the time that you were superintendent that that was not true?

A. I had no information that that was not true until we got into the mine, the latter part of January.

Q. Then what did you discover as to its truth or falsity?

A. I discovered that we had five feet of coal similar to that which we had gone through, and that every foot of it had to be sorted.

(Testimony of John G. Richards.)

Q. Well, was it anything like a solid face of clean coal? A. It was not.

Q. Just describe it as nearly as you can?

A. It was layers of carbonaceous material, divided by sand, clay, and bone coal; in fact, it was all bone coal—fissile.

Q. And when did you first discover that his statement in that respect was not true?

A. About the latter part of January.

Q. And how did you discover it?

A. By personal inspection of the face.

Q. How did you come to get in there?

A. We had been driving a tunnel on and raised up for a room, and from this room we had effected an entrance into the old breast.

Q. Now, just give us the statement that he made relative to that breast being the same as the upper layer of the breast which you could see.

A. Mr. King directed my attention to the upper layer of the vein in the new tunnel; that it was waste —absolutely waste. "But," he says,—

Q. Now, is the new tunnel the one you could see?

A. Yes, that is the one we could see.

Q. Go ahead.

A. "But this has increased in quality, and is the strata from which we mined the coal last winter."

Q. That is the one he said was clean coal?

A. Yes, sir.

Q. Well, how did you find that statement to be borne out by the facts, when you opened this entry?

A. We found that the conditions that existed in

(Testimony of John G. Richards.)

the breast of the new tunnel were about the same as existed in the—

Q. —one you could see?

A. In the one—in the old breast.

Q. That in the one that you could not see.

A. In the one that we could not see when we first went there.

Q. What did you discover as to the amount of coal he produced during the previous 11 months, according to his statement of 2,300 tons?

A. We discovered that there was a considerable shortage.

Q. Well, how much did you discover that he produced in that time?

Mr. CLARK.—That is objected to for the reason that this witness has not shown himself competent to answer any such question.

WITNESS.—Well, from the records we were able to procure, and statements he had written to us of the production for September and October, they would not total 800.

Mr. CLARK.—We move to strike out the answer as being incompetent and immaterial, and for the further reason that the witness has not shown himself competent to answer the question, for the reason that he has not shown from what scource his knowledge was obtained.

Mr. RICHARDS.—Q. From what source did you gain the information as to the quantity Mr. King had produced in September and October, that you mentioned?

(Testimony of John G. Richards.)

A. From stubs of the weigh checks.

Q. No—I am asking you from what source you got it for September and October?

A. From his letters.

Q. Is that letter introduced in evidence?

A. I believe it is.

Q. From what source did you get the information relative to the production between that time and the —I have forgotten what date it was.

A. August the first.

Q. August the first?

A. From the stubs of the weigh checks.

Q. Where did you find those stubs?

A. In the office at the mine.

Q. And what do those stubs show was produced during that time?

Mr. CLARK.—That is objected to as incompetent and immaterial, and not the best evidence.

Mr. RICHARDS.—I think that is correct. I will withdraw that, Mr. Clark.

Q. Mr. Clark interrogated you about when you first became suspicious that the production was not equalling the ratio of production stated by Mr. King. What caused that suspicion to arise?

A. Well, I noticed there was a shortage in December, but I thought owing to the mild weather there might be some excuse; and when it came to the latter part of January and I found these stubs, I was satisfied; but I was suspicious when I discovered the opening in the old breast wasn't as he had represented it.

(Testimony of John G. Richards.)

Q. In the statement you say Mr. King made and represented, relative to the profit that could be made on $6.00 a ton, what was his statement as to the cost of production, per ton?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—He stated that the cost of production was about $3.00.

Mr. RICHARDS.—Q. What did you find the cost of production to be, during the time that you were superintendent?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—That the expenses about equalled the receipts; I couldn't say whether they were more or less.

Mr. RICHARDS.—Q. That doesn't answer my question. I have no idea of what the receipts were. I asked you what the cost per ton of production was, during the time you were superintendent?

A. Well, about $6.00 a ton.

Q. That is the way to put it. Counsel interrogated you as to your willingness to invest your money in that proposition. Why and on what basis were you willing to invest your money in that proposition?

A. On the basis that Mr. King had shown—had represented to us that there was 2,300 tons production; that the breast in the old works was clean, unsortable coal; and that we could more than pay six per cent on the investment.

Q. Did anything in reference to the cost of pro-

(Testimony of John G. Richards.)
duction enter into that?

A. The cost of production was, he said, about $3.00.

Q. Upon that basis would it pay interest upon the amount proposed to be invested in that property?

A. Yes, I think it would.

Q. Then, why were you willing to invest your money in that property?

A. Because I thought there was a continuous vein of this clean unsortable coal, which Mr. King had said existed in the breast in the old face, and that it would pay interest from the start.

Q. Why did you rely upon Mr. King's statement relative to the breast of ore which he described?

A. Because Mr. King I considered to be a friend of mine.

Q. I say, why did you have to rely upon his statement?

A. Because we could not personally inspect this breast.

Q. Did you rely upon it?

A. I did rely on it.

Q. Did you rely upon the statement relative to the cost of production? A. I did.

Q. Did you rely upon the statement relative to the breast you could not see being clean coal, and had become so as an extension of the upper layer of the breast that you could see? A. Yes, sir.

Q. Is there any fruit on that land up there—that coal land? A. There may be a few trees.

Q. Has there been much fruit raised in that coun-

(Testimony of John G. Richards.)

try? A. Not a great deal, but some.

Q. I wish you would state as fully as you can on what basis and for how much the bonds were to be issued on that property, to yourself, Mr. Lamborn, and Mr. King?

A. There was to be an amount of bonds equal to cover the cost we had paid them—$80,000.00—and in addition to that there was an amount provided for to meet improvements.

Q. For the future? A. How is that?

Q. For the future? A. For the future.

Q. Then, of this $80,000.00 that were to be issued, how much was Mr. King to get?

A. Mr. King was to have, in addition to $10,000.00, which represented his—$20,000.00, which represented his one-fourth—I would have to figure that out, Judge, to get it accurately; but he was taking a portion of his—

Q. Take your time; I would just like your statement.

A. He was taking a portion of his payment in bonds.

Q. Well, how much? A. $20,000.00 worth.

Q. That made a total to him of how much?

A. That would make a total to him of $40,000.00 in bonds.

Q. How much were you to get?

A. I was to get for my one-fourth interest $10,000.00.

Q. How much were you to get from him?

A. I was to get from him $22,500.00.

(Testimony of John G. Richards.)

Q. How much was Mr. Lamborn to get?

A. Mr. Lamborn was to get $30,000.00.

Q. And what proportion of the commission bonds that you were to get from Mr. King?

A. I was to get the $22,500.00.

Q. What proportion, if any, of this was Mr. Lamborn to get? A. Three-fourths.

Q. Now, if you can, just tell us what Mr. Lamborn was to have as his final amount, the amount you were to have as your final amount, and the amount that Mr. King was to have as his final amount?

A. Well, I was to receive my final amount before dividing with Mr. Lamborn.

Q. No—you have given that. I want the final result, after you have divided it—just what shape it was to be in?

A. Well, what is ¾ths of $22,500.00?

Q. Well, you can compute it—I don't know.

Mr. H. G. KING.—That is $16,880.00, Judge, if you want it.

Mr. RICHARDS.—Yes—thank you.

WITNESS.—And $30,000.00, representing the amount that he invested.

Mr. H. G. KING.—Mr. Lamborn is to get $32,500.00. The contract contains that.

Mr. RICHARDS.—Does the contract show that, exactly?

Mr. H. G. KING.—Yes, the contract shows exactly.

Mr. RICHARDS.—Well, I don't care about that, then.

(Testimony of John G. Richards.)

Q. How far were the old workings extended from where you originally saw the breast, until it reached the breast which you could not see, which Mr. King stated was good coal?

A. The point where Mr. Pollard was working from the portal of the tunnel I don't know.

Q. Well, give us an idea?

A. But it would be, I should guess, 300 or 400 feet—not so much as 400.

Q. When was that development made by Mr. King, relative to the time when you saw that breast?

A. Judge, I didn't give all the answer to that.

Q. I beg your pardon. I withdraw that question, then, and you may answer.

A. The point—to repeat, the point at which Mr. Pollard was working, I should say was between 300 and 400 feet.

Q. From where?

A. From the portal of the tunnel; and Mr. King's old face that we couldn't see was advanced on in a couple of hundred feet farther.

Q. From the Pollard workings?

A. From the Pollard workings.

Q. And that is the breast you couldn't see?

A. That is the breast we couldn't see.

Q. When was that breast extended from the Pollard workings to the breast that King said was good coal?

A. While Mr. King was operating the mine.

Q. That you never saw, I understand, until January, 1909?

(Testimony of John G. Richards.)

A. I never saw it until January, 1909.

Recross-examination.

(By Mr. CLARK.)

Q. Now, you say that you and Mr. Lamborn were to put up between you $40,000.00 in cash?

A. Yes, sir.

Q. That was all the cash payment that you were to make? A. Yes, sir.

Q. And in view of that cash payment, Lamborn was to have a half interest in this mine, and you were to have a fourth interest? A. Yes, sir.

Q. As a part of that transaction, you agreed that the whole mine would be mortgaged, and bonds issued on it? A. Yes, sir.

Q. That is, the whole 480-acre tract, including the mine? A. Yes, sir.

Q. Bonds for how much?

A. Well, I forget the amount that we specified—more than enough to cover it—but I think it was $200,000.00.

Q. Now, of these bonds that were to be issued, Lamborn was to have $32,500.00?

A. I think that that was an error in the contract; in some way or other that slipped in, in the regular form.

Q. The issue of bonds, as a matter of fact, was to be $80,000.00, wasn't it?

A. Yes; we were to distribute $80,000.00; the rest was merely to cover improvements.

Q. Well, the property was to be bonded for $80,000.00? A. Well, yes in addition—

(Testimony of John G. Richards.)

Q. And it was to be incorporated, the company was, for $200,000.00, and bonded for $80,000.00?

A. No; the bonds were to be—

Q. Well, did you properly express it in this agreement?

A. There is one point in the agreement that I think is wrong.

Q. At the time this agreement was entered into, it was agreed that this property should be bonded for $80,000.00? A. Yes, I believe it was.

Q. Now, of those bonds that were to be issued you were to receive $32,500.00?

A. Yes; that is the final settlement.

Q. And Mr. Lamborn was to receive $32,500.00?

A. From Mr. King.

Q. No—of these bonds—these $80,000.00 bonds?

A. After the whole transaction was through?

Q. Yes?

A. Mr. Lamborn was to receive, in addition to the $30,000.00, the $16,000.00 that we—

Q. Well, that wasn't in the agreement between you fellows?

A. Oh! Us three? No, sir, it was not.

Q. That was a private arrangement you had with Mr. Lamborn? A. Yes, sir.

Q. Now, the agreement was that you was to receive $32,500.00, and Mr. Lamborn was to receive $32,500.00, and Mr. King $15,000.00, of this $80,000.00 bond issue?

A. I believe that that is—I am not clear, though, that Mr. Lamborn was to receive $32,500.00; I think

(Testimony of John G. Richards.)
there is some error there.

Q. Now, then, that would make Mr. Lamborn paying—Mr. Lamborn, under that arrangement would pay $20,000.00 in cash, and receive back about $50,000.00 of the bonds of the company?

A. Well, he was paying $20,000.00 in cash and giving his note for $10,000.00.

Q. Well, $30,000.00? A. $30,000.00.

Q. And receiving back $50,000.00 of the bonds of the company?

A. Well, it would be better than $45,000.00.

Q. Now, you were to pay $10,000.00 in cash, and were to receive back about $15,000.00 of the bonds of the company? A. Yes.

Q. And Mr. King was to retain a fourth interest and receive $15,000.00 of the bonds of the company?

A. That was the original agreement, yes, sir.

Q. Now,—

A. I don't remember about the $15,000.00. Mr. King was to receive the balance; I forget just what the figures are.

Q. Were you to get any additional commission?

A. Mr. King was paying me the $22,500.00 from his bonds.

Q. From his bonds? A. Yes.

Q. That is, he was to pay you $22,500.00 additional; or was this $22,500.00 the bonds that you have referred to?

A. It all comes out of the $80,000.00 bonds.

Q. Well, how was Mr. King paying you that? Those were bonds issued on the entire property of the

(Testimony of John G. Richards.)

company, weren't they? A. Yes.

Q. Well, then, it wasn't Mr. King that was paying you that; it was the company that was paying it to you?

A. Well, we had agreed with Mr. King to take part payment—part of his pay for the property—in bonds.

Q. And you were not getting any commission at all?

A. And Mr. King was to turn to me for my commission a portion of his bonds.

Q. $22,500.00? A. $22,500.00.

Q. You say you told Mr. Lamborn all about that?

A. Yes, sir.

Q. Before this contract was executed?

A. No, sir.

Q. When was it?

A. It was after. I don't know just—whenever the letter indicates.

Q. It was after you had concluded to call this deal off, wasn't it?

A. I think it was. I think it was in March.

Q. You had been trying to dispose of those bonds, hadn't you? A. Yes, sir.

Q. To whom? A. To people in Ohio.

Q. And it was only after you found out that you couldn't dispose of them that you concluded to call this deal off, wasn't it?

A. I could have disposed of them if I had—

Q. Wasn't it only after you found out that you couldn't dispose of them that you concluded to call

this deal off? A. Yes, sir.

Q. When was it you found out you couldn't dispose of them?

A. I found out that I wouldn't dispose of them.

Q. Couldn't dispose of them?

A. That I wouldn't.

Q. Well, didn't you try to dispose of them?

A. I had had some correspondence.

Q. And you found out you couldn't negotiate them, didn't you?

A. No, I didn't find out that I couldn't.

Q. Well, when was it that you had this correspondence?

A. Oh, it existed all through the time that I was there.

Q. Along some time after the first of January you went to some parties in Salmon and asked them if they didn't think that Mr. King would be glad to call this deal off if he would take $5,000.00, didn't you?

Mr. RICHARDS.—Define who he stated it to; he can't tell generally.

Mr. CLARK.—Q. Did you make any such proposition as that?

Mr. RICHARDS.—Objected to, as not calling the witness' attention to the time, person or place where he made that statement; it is not proper impeachment.

WITNESS.—Now, what is your question?

Mr. CLARK.—Q. Did you state to some of Mr. King's friends in Salmon City, after January, 1909, that you thought that Mr. King could better afford

(Testimony of John G. Richards.)

to pay $5,000.00 to you than to have this suit brought?

Mr. RICHARDS.—Objected to, as not a proper impeaching question, because the name of the person, the time when, and the place where this statement was made is not placed before the witness.

WITNESS.—I don't remember that I made that statement, exactly as you put it.

Mr. CLARK.—Q. How did you make it?

A. I said that the proposition was not as represented to us, and that I had been out to the extent of more than $5,000.00 on the deal, and I felt that if Mr. King would adjust that and return our money and notes, that he could have the property.

Q. But you didn't want to let him have the property unless he would pay you $5,000.00, besides returning you your money and your notes? Was that the proposition you made?

A. I desired to be returned that of which we had been improperly—that had been improperly taken from us.

Q. Now, you say that the cost of production of this coal was approximately $6.00 a ton?

A. Yes.

Q. Now, of what was that made up?

A. That was made up of superintendency, miners and tools and explosives.

Q. How did you mine it up there—under the contract system? A. No, sir—day's pay.

Q. How? A. Day's pay.

Q. Day's pay? A. Yes, sir.

Q. Well, now, while you were there you were driv-

(Testimony of John G. Richards.)
ing this tunnel, to try to put the mine in better shape, weren't you? A. Yes, sir.

Q. Well, that would be more expensive than it would be if you had your tunnel completed, and were in shape to mine the property for all it was worth, wouldn't it? A. Yes, sir.

Q. It would be considerably more expensive, wouldn't it? A. Yes, sir.

Q. Well, then, what would be the actual cost of the production of the coal, if you had been simply mining?

A. Well, owing to the sorting, it would be very near the same as it was before.

Q. Do you know what it is being mined for today? A. No, I don't.

Q. Do you know what Mr. Pollard mined it for?

A. Well, I understood that Mr. Pollard didn't sort it. I don't know what he mined it for.

Q. You don't know what he mined it for?

A. No.

Q. Do you know what Mr. Miller mined it for—or Mr. King, after he bought it from Mr. Pollard?

A. No, I don't.

Q. How do you estimate the cost of the production of a ton of coal out of that mine?

A. By taking the average for a term of months, or a year.

Q. What salary were you receiving?

A. Nothing.

Q. Nothing? A. No.

Q. And you say that it cost $6.00 a ton, or will

(Testimony of John G. Richards.)

cost $6.00 a ton now, to mine from that mine, and does cost that?

A. It may cost that, and it may cost more.

Q. It may cost more?

A. Yes—I wouldn't say.

Q. And it may cost considerable less, too?

A. Well, not much less.

Q. You are certain of that?

A. Yes, sir—not much less.

Q. Well, why was it that you could not investigate and find out what the cost of production was when you were there?

A. Well, I wasn't especially interested, any more than Mr. King's word he had given me.

Q. Well, you did find out, though, when you first took the management of the mine, didn't you, what the cost of production was?

A. I had it from Mr. King.

Q. Well, when you were managing the mine there, in August and September and October and November and December?

A. Yes, I found it out for the time we were using it.

Q. What the cost of production was?

A. About, yes.

Q. And you found it averaged about $6.00 a ton?

A. Yes, sir.

Q. And long after you knew about this, you made these payments in January, didn't you?

A. Yes, sir.

Q. So that it wasn't the cost of production that

(Testimony of John G. Richards.)
caused you to call off this contract, was it?

A. No, sir.

Q. Because the cost of production didn't scare you, did it?

A. Well, I thought we were going to open up into these rooms, and then we would materially reduce the cost of production as soon as we got into the coal that didn't have to be sorted, then our cost would be materially reduced.

Q. So it wasn't the cost of production that caused you to call off the contract, was it?

A. It was after we looked into it, yes; I could see that our cost of production was going to be about the same.

Q. You made the largest payment after you knew what the cost of production was, didn't you?

A. I knew what the cost of production was for the quality of coal we were driving through, but I was driving for the coal that Mr. King said was clean and unsortable coal.

Q. But you don't know what the cost of production is, then, do you?

A. I know it to be about $6.00, or possibly a little less.

Q. Would you think that the people who are there, actually taking that coal out and know what the cost of production is, that their judgment would be better than yours?

A. They might be able to show estimates.

Q. During what time was it that you say that Mr. King said this 2,300 tons was taken out?

(Testimony of John G. Richards.)

A. The period for which he had operated it.

Q. You figured that it would be about 2,300 tons a year?

A. No; I figured on a considerable increase.

Q. Yes; but you understood the estimate to be about 2,300 tons a year?

A. For the previous year, and it had been materially increased for the year before.

Q. And you figured that he had represented to you that the mine had produced 2,300 tons during the previous year? A. Yes, sir.

Q. And you expected that it would produce 2,300 tons during the next year? A. And more.

Q. And more? A. Yes, sir.

Q. Now, just what was it that Mr. King said to you about that production?

A. Mr. King said that the production had been 2,300 tons, and he could show us an increase over that; and in addition to the 2,300 tons, he had supplied 300 tons to this mine, at the Copper Queen.

Q. Now, he said, then, that the total production had been 2,300 tons?

A. And more than 2,300 tons.

Q. Well, your telegram shows it there, don't it?

A. Yes, 2,300 tons; but in our conversation it was a little more than that, he wasn't certain.

Q. That was the amount you relied on?

A. Yes, that is the amount we relied on.

Q. Now, the only reason why you could not produce that, and furnish it to the people of Salmon the next year, was that the demand was not sufficient?

(Testimony of John G. Richards.)

A. Yes, sir.

Q. You probably could have increased that if the demand had been sufficient?

A. Yes, sir, we could.

Q. Now, all you know about that 2,300 tons not being produced is what you discovered from some stubs which you say you found?

A. And in conversation with Mr. Miller.

Q. Those two ways is all you know about it?

A. And comparing the sales of the year that we were there with the year that he was there.

Q. Where were these stubs kept?

A. They were kept up at the office.

Q. At the mine?

A. At the mine, over the door.

Q. When you and Mr. Lamborn were there, they were presumably there in the office?

A. I presume they were.

Q. You knew that they were weighing this coal right there at the mine, that they were taking to various customers of the mine? A. Yes, sir.

Q. Didn't you ask to look at the stubs?

A. I did. Mr. Miller didn't know that they were there. Mr. Miller answered that Mr. King had the receipts for the tonnage.

Q. Did you ask Mr. King to look at them?

A. I did, repeatedly.

Q. When was that?

A. I asked him—well, about every month.

Q. Well, did you ask him before this contract was signed?

(Testimony of John G. Richards.)

A. I don't remember that I did; I may have.

Q. You knew that those stubs were kept?

A. I thought they were.

Q. And you knew that you could go there and look at them?

A. No, I couldn't go there and look at them.

Q. Why couldn't you?

A. Because Mr. King had them in his desk.

Q. Didn't you say they were kept up there at the mine? A. Yes; but those were not thought of.

Q. Not thought of? A. No.

Q. Well, when was it you first asked Mr. King to look at those stubs?

A. Well, I probably asked him some time in July.

Q. Before you entered into this contract?

A. Yes, and he said yes, that he would; but he was always busy at that time.

Q. Well, then, you were not taking his word for it; you wanted to look at the stubs to verify his statement? A. I did take his word.

Q. But you wanted to look at the stubs to verify his statement?

A. Yes, but I wasn't particularly anxious.

Q. And he didn't show them to you, and you kind of let the matter go? A. I did.

Q. He didn't refuse to show them to you?

A. But he didn't. He said "If you will come down to-morrow or some other time."

Q. Well, did you go around to-morrow?

A. I was there every day; that was my loafing-place.

(Testimony of John G. Richards.)

Q. But you only recollect of asking him for them once? A. Well, I asked for them lots of times.

Q. And before this contract was entered into?

A. Yes, I asked him for them before, I think.

Q. Did you ask Mr. Miller about the production?

A. I think I did.

Q. Did you ask anybody else around there?

A. I don't believe I did.

Q. Did you ask Mr. Pollard?

A. I don't think I did.

Q. You saw Mr. Pollard there the first time you were up there? A. Yes.

Q. And you talked with him some about the mine?

A. Yes.

Q. And about its production?

A. I might have. I don't know what conversation I did have with him then.

Q. And you saw Mr. Pollard when you and Mr. Lamborn were up there?

A. No, I don't think we saw Mr. Pollard there. We might have met him on the street; I rather think we did.

Q. Then, if I understand you correctly, you are setting this production estimate up to the standard from what you saw on the stubs, and from what Mr. Miller told you?

A. Yes, and they didn't compare with those.

Q. Well, you didn't expect them to compare with the amount you were taking out, did you?

A. I expected them to be much less.

Q. You expected them to be much more, didn't

(Testimony of John G. Richards.)

you, because you understood you were not working that mine to its full capacity, were you?

A. We were working the mine to the full capacity of the demand.

Q. But you were not working it to its full capacity, were you?

A. No; we could have put in more tonnage if we had had more custom.

Q. And it was merely a question of how many people wanted to buy? A. Yes.

Mr. RICHARDS.—Q. You were interrogated relative to your effort to dispose of your bonds. What, if anything, did the failure to dispose of those bonds have to do with your desire to rescind this contract?

A. I had been carrying on this correspondence with people in Ohio,—

Q. Well, I am asking what your failure to dispose of those bonds had to do with your desire to rescind this contract?

A. Because we had found the representations to be false, and the bonds would be worthless.

Q. In order to develop any coal mine and operate it properly, is it necessary to keep your dead-work extending all the time, to open up new ground?

A. All the time.

Q. Can you operate a mine any time and not charge that up as part of the expense of the production of coal? A. No, sir, you can't.

Q. You were interrogated about making your payments in January, after counsel says you knew

(Testimony of John G. Richards.)

that the production was not what it was before. What do you know about that, and what did you rely upon?

A. I do know it. I discussed the matter with Mr. King. I told him it seemed as though we were going to fall short, and considerably short of the production that he had made the year before, and asked him if there could be any possibility of his being mistaken in his representation to us, and he says "No; I supplied 2,300 tons, and I know I did."

Q. What, if any knowledge had you at the time you made the payments in January of the fact that his statements about production, and about the character of the breast you couldn't see, being true or not?

A. I had no opportunity to know. I took his word for that.

Q. Why did you not work the King breast, which you couldn't see, after you opened the hole through there so you could see it?

A. Because we had openings where we were raising a room in the same territory that it was in.

Q. How did it compare in quality with the breast which you had just opened?

A. It was about the same.

Q. (Papers shown witness.) I wish you would state generally what those are?

A. Well, these are a portion of the weight stubs for the time that Mr. King operated the mine.

Q. Where did you find those?

A. I found those at the office at the mine.

(Testimony of John G. Richards.)

Mr. RICHARDS.—We would like to have these marked exhibit—whatever it is—for identification.

(The Special Examiner thereupon marked the same for identification as Plaintiffs' Exhibit "K.")

Mr. CLARK.—Q. How much were you paying your men at the mine?

A. I believe we paid the common miners $3.00.

Q. How many tons of coal a day could one man produce?

A. Well, one man—do you mean to sort it and all?

Q. No—of the mining proper—to take the coal out of the mine.

A. Well, as we worked it, it was about a ton to two men.

Q. Then, when you were working it, two men produced about one ton of coal a day?

A. Something like that, yes.

Q. And sorted it?

A. And sorted it, and that would include delivery?

Q. Well, how much coal could two men mine in a day? A. Mine?

Q. Yes.

A. That depends upon the width of the vein; but in that case a man ought to mine four or five tons, easily; probably he might make a run of more than that; but I should say that five or six tons would be—

Q. For one man? A. Yes.

Q. And how much a ton does it cost to sort it?

(Testimony of John G. Richards.)

A. Well, it cost about as much to sort it as it did to mine it.

Q. Well, how much?

A. In the neighborhood of $3.00.

Q. A ton? A. Yes.

Q. To sort it?

A. Yes. No—it wouldn't cost quite as much as it would to mine it; but then—

Q. Well, it didn't cost $3.00 a ton to mine it, did it? One man, you said, could mine six or seven tons a day, and if he was working for $3.00 a day—

A. That was in good coal; but this is different.

Q. Well, didn't you say under those conditions that existed up there?

A. Oh, I wasn't considering that good coal.

Q. Well, I was asking you what it would cost to mine that coal. Didn't you understand that?

A. Yes, sir.

Q. Now, I asked you how much you paid them per day? A. $3.00 a day.

Q. And how much could they mine?

A. They mined on an average about half a ton to the man employed.

Q. Then you mined a half a ton to the man employed? A. Yes, sir.

Q. While you were manager of that mine?

A. Yes, sir.

Q. And you are basing your estimate of the cost of production on the fact that when you were there one man would mine a half a ton a day, are you?

A. I based my cost of production on the amount

(Testimony of John G. Richards.)

of coal we sold and the amount the payroll produced.

Q. And while you were there one man would mine half a ton a day, would he?

A. Including the superintendent and all, it would equal about one-half a ton per man.

Q. Then the miner wouldn't mine a half a ton a day?

A. Yes; he would mine more than a half a ton.

Q. Well, how much more?

A. He might mine nearly a ton.

Q. Nearly a ton?

A. Yes; that is, the man that broke it would break a ton, and a little more than a ton; but it took two men to prepare that ton for market.

Q. Well, then, in mining and sorting it, how much could you mine and store a day, per man?

A. We would mine and store, per man, a little more than a ton a day; approximately a ton.

Q. Well, how much more?

A. Mine and store? Q. Yes.

A. Mine and store, for two men, a trifle more than a ton a day.

Q. And how much more?

A. Well, it wouldn't be two tons; it wouldn't be a ton and a half.

Q. Well, then, it wouldn't be a ton and a half?

A. No.

Q. Would it be a ton and a quarter?

A. Well, it might be.

Q. Well, would it be?

(Testimony of John G. Richards.)

A. Sometimes it would be, and sometimes it wouldn't be.

Q. Well, then, probably an average of a ton and a quarter for two men? A. Yes.

Q. A day? A. Yes.

Q. And then that would cost you $6.00 to mine it and store it—a ton and a quarter?

A. And deliver it to the trade.

Q. Well, I didn't ask you that, Mr. Richards. You said that it would cost— I asked you this question: How much it would cost to mine and store that —or how much per man— Well, I am asking you how much you could mine and store per man per day? Now, that is the question I asked you, and about that there is no ambiguity.

A. Now, Mr. Clark, I can't answer that specifically, because, as I told you, my estimate was based upon the tonnage sold and the cost of it.

Q. In other words, you just simply lumped up the amount of coal that you produced from that mine, and what you got for it; and you found out in the end that it balanced up?

A. Yes, just about balanced.

Q. Well, therefore you say it cost $6.00 a ton to mine it?

A. Yes—mine it and deliver it to the trade.

Q. And that's all you know about the cost of production, is it? A. Yes, sir.

Mr. RICHARDS.—Q. What must you take into consideration, as you worked there, in determining the cost of production of a ton of coal?

(Testimony of John G. Richards.)

A. You must take into consideration the labor, the tools, the explosives, the delivering to the trade, and superintendency and timbers.

Q. In other words, the entire expense of running the mine?

A. The entire expense of running the mine.

[Testimony of C. Albee, for Plaintiffs.]

C. ALBEE, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. RICHARDS.)

Q. Mr. Albee, you may state your name?

A. Albee.

Q. Your initials? A. C.

Q. Where do you live, Mr. Albee?

A. At Red Rock, Montana.

Q. Were you ever acquainted with what is known as the Copper Queen mine? A. Yes, sir.

Q. Were you present there when the coal was delivered to that mine from what is called the King property, here in controversy?

A. I was present when some of it was delivered.

Q. What position did you occupy there then?

A. Bookkeeper.

Q. As such bookkeeper do you know as to the quantity of coal delivered there?

A. Not to be absolutely sure.

Q. Well, substantially correct?

A. Oh, I would rather put it under a certain amount.

(Testimony of C. Albee.)

Q. Well, I am just asking about your knowledge of the substantial amount of coal delivered there?

A. I couldn't put it within ten ton, I don't think.

Q. Well, can you put it within ten ton?

A. I think I can.

Q. How much was delivered there to the mine, within ten tons?

Mr. CLARK.—During what period? I didn't understand—

Mr. RICHARDS.—The fall of 1907.

WITNESS.—Well, perhaps if I said a word; that is, that I was only there from August 9th to December 24th.

Q. What year? A. 1907.

Q. Well, give us the amount delivered, substantially, at that time?

A. I think it wasn't over 25 ton.

(No cross-examination.)

[Testimony of F. C. Miller, for Plaintiffs.]

F. C. MILLER, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. RICHARDS.)

Q. State your name, Mr. Miller.

A. F. C. Miller.

Q. Where do you reside?

A. Salmon, Idaho.

Q. How long have you lived there?

A. About a little over two years.

(Testimony of F. C. Miller.)

Q. Are you acquainted with the coal property in controversy here? A. Yes, sir.

Q. How long have you been acquainted with it?

A. About the same time I have lived in Salmon.

Q. How familiar have you been with that property?

A. Well, I was there in the mine just about shortly after Mr. King, I believe, had negotiated for it.

Q. How familiar have you been with it since that time?

A. I have been there since Mr. King bought it, continuously.

Q. What position have you held there relative to the mine? A. Superintendent.

Q. As superintendent what have you had to do with the working of the property?

A. Why, when I first went up there I had to put in—

Q. Well, I just meant generally. You had knowledge of the entire transaction of what work was going on there? A. Yes.

Q. What, if any knowledge had you of the delivery of coal—of the mining and delivery of coal from that property, between September 1st, 1907, and August 1st, 1908?

A. Why, I never kept any books. While I was at the mine all I did was simply to keep the time of the men that I was working; and then I kept—that is, I took the weights as they were—as the coal

(Testimony of F. C. Miller.)
was weighed out. This was after—some time after September 1st.

Q. Of 1907?

A. Of 1907, yes. Previous to that I haven't any knowledge.

Q. When you took those weights what did you do with them?

A. Why, I left them there in the office—those stubs—and then I—

Q. You placed those weights, Mr. Miller, upon what? A. How is that?

Q. When you took those weights where did you put them down?

A. Why, I put them down in a book similar to that. (Indicating Plaintiffs' Exhibit "K.")

Q. Plaintiffs' Exhibit for Identification, "K," shown witness. You may examine that, Mr. Miller, and state what it is.

A. These look to me to be the stubs of some weights that I—

Q. These are the stubs upon which you placed the weights that you took?

A. —placed the weights that I took, yes.

Q. Then the figures shown on these stubs are the weights that you placed there as they were weighed from day to day?

A. Yes; but a great many of them—that is, there are some that I could not have put there, and—

Q. These are the regular stubs that were kept there by the company, under your supervision?

A. Yes, sir.

(Testimony of F. C. Miller.)

Q. Whatever was sold or delivered of coal there, the weights were put upon these stubs as taken?

A. They were put upon there, yes.

Mr. CLARK.—May I examine him as to his competency?

Mr. RICHARDS.—Sure.

Mr. CLARK.—Q. Mr. Miller, have you anything from which you can tell whether or not these stubs, as shown here to you by Judge Richards, contain the weights of all the coal that was delivered from your mine during that time—the mine of which you were superintendent?

A. No; I can't say that those are all the stubs, no.

Q. Was all the coal weighed at your place there?

A. No, not all of it.

Q. Where was some of it weighed?

A. Down at Chet. Gibson's livery barn, and Mr. Kingsbury's barn—two places.

Q. Then, the stubs of the coal that was weighed there would not be here, would they?

A. No, they wouldn't be there.

Q. And you have no way of knowing how much that was?

A. No, I wouldn't. I didn't pay any attention to that.

Q. Then, these stubs, in so far as they show the weights of the coal from that mine, are only the stubs that were connected there with the mine?

A. Yes; those were some that were in the office.

Q. And you don't know whether those are all the stubs or not?

(Testimony of F. C. Miller.)

A. I couldn't swear to it; no.

Q. As a matter of fact, they are detached, aren't they? A. Yes.

Q. Whose possession have these been in? Where did they come from?

A. They were up in the office.

Q. Did you bring them down with you?

A. No. Mr. Richards took them from the office while he was Manager there.

Q. And they have been in his possession since then? A. In his possession, yes.

Mr. RICHARDS.—Q. About what quantity of coal was measured or weighed downtown, in proportion to the amount weighed at the mine, if you remember?

A. Why, I couldn't exactly state that.

Q. No, not exactly, but generally?

A. I wouldn't hardly attempt to make a general estimate, because I was at the mine all the time.

Q. I wish you would examine this exhibit and see if the Kingsbury and other weights are not all there, as well as the weights at the mine?

A. I am positive that the weights that Mr. Kingsbury gave us for the coal are not in here.

Q. They are not in here? A. Yes.

Q. What makes you positive of that, Mr. Miller?

A. Because Mr. Kingsbury never had any books. There were no books like this printed at that time. These books were printed just about the time we were ready to weigh the coal ourselves at the mine.

(Testimony of F. C. Miller.)

Q. Well, printed about the first of September, 1907?

A. Well, along about that time, yes, as I remember it.

Q. And after these were printed were all the weights put in these stubs that were weighed at the mine?

A. From that time until the time that Mr. Richards took this?

Q. Yes— No—I am speaking now, Mr. Miller, between about the first of September, 1907, I think, and the first of August, 1908.

A. Why, from the first of September to along about the first of December, or maybe the middle of December, I wouldn't be certain about it, we never did any weighing at the mine; it was all done downtown at these livery barns.

Q. That is, between September, 1907, and December, 1907? A. 1907.

Q. All weighing was downtown? A. Yes.

Q. Well, were those weights recorded in these stubs for those dates? A. No.

Q. Now, you commenced this recording in these stubs some time in the early part of December, 1907, as I understand it?

A. Well, as near as I remember, just about the time that we got our scale put in. It was some time ago.

Q. November, 1907?

A. In December, I think. I can't say positively.

Q. You notice in these stubs that the first date

(Testimony of F. C. Miller.)
is November 15th, 1907?

A. Well, then, that is, the time we put the scale in, was just about that time.

Q. Then you notice that the dates go consecutively along, do you? A. Yes, they seem to.

Q. Then from that date all the coal taken from the mine was weighed at the mine and placed in these stubs? A. Yes.

Q. And whatever was weighed at the other scales downtown was before this date of November 15th, 1907? A. Previous to that time, yes.

Mr. RICHARDS.—Now, I am a little in doubt as to just what is the best way to do with this—these figures are here—whether to put it in the record or not. Of course, these sheets are loose, and if they are put in as a mere exhibit they are liable to get scattered and disarranged before the argument, and I can read them right into the record.

Mr. CLARK.—I would prefer, Judge, to have those books go in.

Mr. RICHARDS.—Well, I would introduce them.

Mr. CLARK.—And a computation may be made from them. Have you made a computation yourself?

Mr. RICHARDS.—We have made a computation ourselves. Three of us checked it up, and there was 585 tons. We checked it within two tons.

Mr. CLARK.—Well, I have no doubt but what that is correct, as shown by the stubs, and you can put that in there and give us a chance to check them up to see if there is any error. Of course, we would

(Testimony of F. C. Miller.)
like the Judge to see them.

Mr. RICHARDS.—Well, we want them in; but they are all loose leaves and they may become disarranged.

Mr. CLARK.—Well, I wouldn't want to absolutely accept your figures; but couldn't you just bind this up? I desire to enter a general objection to their introduction, as being incompetent and immaterial. Just how much did you say you had totalled them to be?

Mr. RICHARDS.—Our estimate is 585 tons; we checked within two tons of each other. This estimate starts with the date of November 15th, 1907, and continues through until the 15th day of July, 1908.

Q. During your work at the mine, during the time you have spent there up until July, 1908, about what did it cost to mine and deliver that coal, per ton, if you can tell?

A. Well, would you want that to include all improvements that were made, and so on?

Q. No; I mean to include, Mr. Miller, only the actual expense of running the mine, such as running ahead of the workings, and the stoping, and the timbering, and the superintendence, and the pay of the men, and the general expense of running the mine—not improvements—and hauling and delivering.

A. Well, I had two and three men working in the room that we were driving ahead, getting out this coal, and I was paying—on the start I paid them $3.50 a day, and then I managed to get them for $3.00

(Testimony of F. C. Miller.)

a day, and they were able, under the crude method that we were working this coal out, to put about all the way from three ton to six or seven ton a day into the chute.

Q. Was that sorted coal? A. Yes.

Q. Now, what was the expense besides the men that were actually working? A. Well,—

Q. Timbering, or— A. Timbering.

Q. Timbering,—

A. These miners did their own timbering in that room. It didn't require much timbering, except to set a prop occasionally.

Q. Then what would be the cost, per ton, for the entire expense of running the mine as you state?

A. Well, taking it on a basis—on an average of say four ton to the—call that two and a half men, because I didn't have three men, you see—I had three part of the time and two part of the time—you can calculate what that would be, about.

Q. About four tons to the shift?

A. Yes, just about.

Q. Would that include hauling and delivery?

A. Well, it wouldn't include the delivery.

Q. Well, including the delivery?

A. We paid 80 cents a ton—we contracted that—for delivery, at that time.

Q. What, if any profit, could you realize from working that mine, at the price you sold the coal, at $6.00 a ton, and the cost of production during that time?

A. Well, excluding all our outside improvements,

(Testimony of F. C. Miller.)

I should say approximately that we had ought to have made about close to $3.00 a ton.

Q. Well, did you make that?

A. Well, I never calculated it exactly.

Q. You think, then, the cost of production would not exceed $3.00, including delivery?

A. No, not at that time.

Q. Between the first of September, 1907, and the first of July, 1908?

A. I would say about that.

Q. Taking the breast that has been mentioned here as the one which they could not see when Mr. Lamborn was there; what was the character of that coal in that breast?

A. The character of the coal in the breast—well, it was better than the coal in the main entry which Mr. Lamborn saw.

Q. It was better in what respect, Mr. Miller?

A. It didn't contain the sand.

Q. What was the entire width made up of in a general way?

A. In the breast that Mr. Lamborn didn't see?

Q. In the breast that he didn't see, yes.

A. Why, there was a bottom coal there, probably from eight inches to a foot, that was perfectly clean; and then there was a little clay seam of about two inches, perhaps; and between that clay seam and a bone seam there was about a foot—the bone seam was probably about—oh, it varied all the way from two to four or five inches; then on top of that again we used to shoot off a layer of coal that was—that would

be as high as two feet—that is, it would run from not less than 18 inches up to that; and then we got another very small clay band; and we got then a top coal that was about ten inches, and that was clean coal; then on top of that we had a clay clod or seam—a band—that was possibly all the way from three to six inches.

Q. How did that breast compare with the upper portion of the breast which Mr. Lamborn could see?

A. Well, the breast that Mr. Lamborn could see—there was a layer of good coal in the bottom.

Q. I am limiting my question, Mr. Miller, to the upper portion. A. Oh, the upper portion?

Q. Yes.

A. Well, that clay band was in the upper portion, as near as I remember, when Mr. Lamborn was there, all the way from three to six inches; and beneath that there were three distinct layers of coal, about 12 inches to maybe 14 or 16 inches in width.

Q. Now, how did that compare generally—the breast that he could not see—with the upper portion of the breast that he could see?

A. Well, it was more sandy; it wasn't as good a commercial coal.

Q. Which was more sandy?

A. The one that he could see.

Q. Well, about how would it compare in percentage?

A. Well, approximately, I think that the coal in the breast was probably a third better.

Q. The coal in the breast that he couldn't see was

(Testimony of F. C. Miller.)

about a third better than the coal he could see?

A. Yes.

Q. How did that breast that he could not see compare with the coal that you worked and extracted?

A. Why, it never was as good as the coal that we had in farther; it always was more sandy, till we got out of it.

Q. About how far is the breast which he could not see at the time Mr. Lamborn was there, from the point where Mr. Pollard worked?

A. Why, I can tell you pretty closely from a map I have here. I haven't committed these things to memory.

Q. Well, refresh your memory from that.

(Witness examined map.)

A. It was 487.46 feet from the portal of the tunnel—the one he couldn't see.

Q. Now, how far from what is called the Pollard—

A. And the one he could see was 232.7 feet from the portal.

Q. How much farther in is the breast he couldn't see from the opening called the Pollard opening?

A. Well, that is 596.28 feet from the portal. It is right in here. (Indicating upon map.)

Q. That is, the breast that he could not see is five hundred and some— A. 596.28.

Q. What was the condition of that breast that they say they couldn't see, relative to being able to see it at the time Mr. Lamborn and Mr. King was there? A. What is the condition?

(Testimony of F. C. Miller.)

Q. Relative to your ability to go in and see it?

A. Why, we couldn't get through, on account of the old entry being caved, and bad air—bad air, principally.

Q. How long have you been engaged in coal mining, Mr. Miller?

A. Well, I put in about eight months prospecting, and then during that time that I have been working for Mr. King. That is the extent of my coal mining.

Q. Do you call the breast of the opening which Mr. Lamborn could see, do you call that coal?

A. Well, that's what we call it.

Q. How much of it is coal, in your judgment?

A. Oh, if the clay bands were out of it, and clods, it would probably be three and a half feet of coal, or four feet of coal.

Q. Could you give us an idea of it in percentage?

A. Well, you could probably put it at 75 per cent.

Q. You think 75 per cent of the breast that he could see was good coal? A. Yes, sir.

Q. What percentage had the breast he couldn't see? A. 25.

Q. 25? A. Oh—that he couldn't—

Q. The one that he couldn't see?

A. Mr. Lamborn?

Q. Yes. A. That was probably maybe 85.

Q. Then, you will say that those two breasts showed from 75 to 85 per cent of clean coal?

A. Yes.

Q. You are sure of that, are you?

(Testimony of F. C. Miller.)

A. Well, I feel pretty sure. That is, I figure like that: Now, the waste we throw out would run from 15 to 25 per cent of what we mine out of the mine.

Q. Now, what percentage, as nearly as you can estimate, was the shale in the breast that he could see?

A. There was no shale in it.

Q. What percentage was bone coal?

A. Well, there was about on an average of three inches in the width from the bottom up to the clod, which would be about five and a half feet.

Q. That is all there was of that?

A. Well, that is all the bone that there was in it—what we call bone.

Q. What was there in the way of clay or sand?

A. Well, as I remember that, there is that bottom seam, which runs from 8 to 10 or 12 inches, and then there was that two inches of clay band or sandstone, and then there would be a block of 18 inches—14 or 18, something like that—of good coal, and then there would be a narrow seam of clay, and then 12 or 14 inches, or maybe a little more, of good coal, and then there is another band of about an inch, or an inch and a quarter or an inch and a half.

Q. About what percentage of clay and sand of that kind was in the breast?

A. Well, there would be about—3 and 2 is 5—well, say there would be about six inches of that material in the five and a half feet.

Q. In the breast?

A. Yes, that Mr. Lamborn saw.

Q. How high was—or how thick was the breast

(Testimony of F. C. Miller.)

of what you call the coal that Mr. Lamborn could see?

A. Why, we had it opened there in one place, and I think it was about 9 or 10 feet high.

Q. Now, what percentage of that 9 or 10 feet do you say was coal?

A. Well, we mined—there was a clod run right in the center of it—we mined underneath the clod.

Q. Nothing above that?

A. Well, we did some, but not to amount to anything; it wasn't profitable to do it.

Q. And how far was that clod from the bottom?

A. Five and a half or six feet.

Q. Your coal or vein was five and a half feet thick? A. Five and a half to six feet.

Q. What was the thickness of that vein at the breast that Mr. Lamborn couldn't see?

A. Well, it ranged along about from five and a half to six or seven feet.

Q. Now, what proportion of that breast do you mine for coal?

A. Why, we mined all of it, up to the clod.

Q. And how high was that from the bottom, Mr. Miller? A. From the bottom?

Q. Yes.

A. Well, that was all the way from five and a half to seven feet.

Q. Was it coal clear to the bottom?

A. Not clean coal all the way through; there was these *her* clods.

Q. Did you mine it clear to the bottom as coal,

(Testimony of F. C. Miller.)

before sorting? A. Yes; we run it all out.

Q. So that the width you mined in that face was about five and a half feet?

A. Five and a half to seven feet.

Q. What were the relative proportions of waste in that breast compared with the breast he could see?

A. Well, it is just as I said—about ten per cent difference.

Q. A little bit better? A. Yes, sir.

Q. That is, there is a little less waste?

A. There is less waste in it, yes.

Q. Now, when you were mining from the breast that Mr. Lamborn could see, you mined at that time simply the upper portion above the clod, did you?

A. No; we mined the lower.

Q. Up to the time that Mr. Lamborn was there?

A. Yes. We might have mined a little of the upper—not much, though—that is, as we were driving in the entry.

Q. Well, when Mr. Lamborn was there, was that lower portion of the breast he could see, which you say was fairly good coal, conspicuous, so he could see it? A. Yes.

Q. So, from about July, 1907, you mined that lower strata of the breast that could be seen?

A. 1907?

Q. Yes. A. 1908, wasn't it?

Q. Well, from the fall of 1907 up until Mr. Lamborn was there, you mined the lower portion of the breast that he could see, did you?

(Testimony of F. C. Miller.)

A. Well, I am pretty certain that we did, yes. There was a fault when we got into the mine along about 600—no, about 400 feet, and it was hard to distinguish whether it was the upper seam or the lower seam; but it is my impression that we always mined the lower seam; in fact, I rather feel sure of that, because there was a cave in the mine farther in there, and I saw up in the cave about three feet of that top measure.

Q. Do you have any knowledge of how much coal was delivered in the fall of 1907 at the Copper Queen mine?

A. No, I don't. I know that there was teams come there for coal.

Q. You kept no account?

A. I kept no account. I simply loaded them, or had them loaded, and sent them off.

Q. About how did the tonnage which you took out of the mine in September and October, of 1907, compare with the tonnage in December and January and the succeeding months?

A. Well, as I remember it, either of those winters were not very cold, and it would be pretty hard for me to tell whether there was any difference, and what difference there might be.

Q. Nothing to call your attention to it?

A. Nothing to call my attention to it, particularly.

Q. Well, do you think it was any greater during December and January than it was in October?

A. Oh, yes, it was greater in those months; that

(Testimony of F. C. Miller.)

is, some greater.

Q. Because it was colder weather, and the demand was greater? A. Yes, there was more demand.

Q. Have you any idea at this time, approximating accuracy, as to the amount of tonnage mined there during September and October, and up to the middle of November, of 1907?

A. No; I would hardly be able to say.

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Miller, how old are you?

A. I am 38 years old.

Q. How much experience have you had in mining? A. I started mining in '92—no—'91.

Q. '91? A. Yes, I think '91.

Q. 1891? A. Yes, 1891.

Q. You have been engaged in mining, then, for something like 20 years?

A. Well, during that time there was about two years that I did a little promotion work, and I was in a sawmill.

Q. But that has been your occupation?

A. Yes, mining has been my principal occupation.

Q. You are what might be called a practical miner? A. Yes, sir.

Q. Now, when was it you say you went to the King mine to take charge of it?

A. September 1st, 1907.

Q. Do you recollect when Mr. Richards was there at the mine?

(Testimony of F. C. Miller.)

A. Yes, sir. That is, at what time—with Mr. King?

Q. Yes.

A. Why, we were there one day—it was a rainy day, I recollect—this was previous to September first—that is my recollection—only a few days, though.

Q. Do you recollect when Mr. Richards and Mr. Lamborn came out there?

A. Yes, I recollect that.

Q. You were superintendent of the mine then?

A. Yes.

Q. They asked you some questions about it?

A. Yes, they did in a general way.

Q. Did you give them such information as you could?

A. Well, I didn't have very much to say.

Q. But you answered their questions?

A. Oh, yes—their questions, yes.

Q. Now, Mr. Miller, you have been the superintendent of that mine since you went there in September, 1907? A. Yes, sir.

Q. And you have had the control of it since that time?

A. Yes, sir; that is, not entirely all that time. I don't feel as if I had the control of it while Mr. Richards was there; I feel that he was—

Q. When Mr. Richards was there, did he go into the mine? A. Yes, sir.

Q. And watched the operations?

A. And watched the operations, that's all?

(Testimony of F. C. Miller.)

Q. And told you what to do?

A. Well, he didn't offer many suggestions.

Q. Now, what kind of coal is this?

A. It is lignite.

Q. I show you a sample, which I will ask to have marked for identification Defendant's Exhibit 9, on cross-examination, and I will ask you if that is a fair sample of what you call coal of this mine?

A. That is the bottom coal in the mine.

Q. And about how much of that coal do you have?

A. All the way from 8 inches to 12 inches.

Q. And what is the difference between that sample and the other coal in the mine?

A. Well, this here is practically the best sample that we have. Still, we have a layer of coal that is about the same width that will go about as well, I think, in fixed carbon and volatile matter that this does, which is near to the clod; but that is in farther, and that runs about the same width. We call that top coal. We used to let that hang and then mine it from one shoot in the room and let it come down—wedge it down.

Q. Have you been superintending the mine there this last winter? A. Yes, sir.

Q. And have you been selling the coal generally from the mine? A. Yes, sir.

Q. Or has Mr. King been selling it?

A. Yes, sir.

Q. Now, have you a statement of the production of the mine there, for a certain length of time this winter?

(Testimony of F. C. Miller.)

A. No, I haven't a statement. I think that is kept down at the lumber office,

Q. Have you seen a statement of it?

A. Why, I saw one just before I left, or I believe Mr. King showed me one on his way out.

Q. Did you verify it? A. Yes.

Q. Is it correct, the one you saw?

A. Yes, sir.

Mr. CLARK.—I ask to have this marked for identification.

(The Special Examiner marked the same Defendant's Exhibit 10.)

Q. I ask you to look at this statement, Mr. Miller, marked Defendants' Exhibit 10, on cross-examination, and ask you for what months that statement shows the production of this mine?

Mr. RICHARDS.—That is objected to as incompetent, irrelevant and immaterial, as it does not tend to prove or disprove any of the issues of this case.

Mr. CLARK.—We offer it for the purpose of showing that this is a valuable mine, and that the coal is of commercial value.

Mr. RICHARDS.—Well, that is not in issue.

Mr. CLARK.—Your witness, Mr. Forrester, testified that it was of no value, and that the coal was of no commercial value.

Mr. RICHARDS.—Well, you saved your exception to it.

(The witness examined said statement.)

WITNESS.—As near as I can tell, that looks all right to me.

(Testimony of F. C. Miller.)

Mr. CLARK.—Q. Now, for what months does that statement cover?

A. Why, that is from the first of October to the first of January.

Q. From the first of October, 1909, to the first of January, 1910? A. Yes.

Q. Three months? A. Yes.

Q. Was the coal shown here taken from that mine and delivered to these people?

Mr. RICHARDS.—That is objected to as incompetent, irrelevant and immaterial, and it does not tend to prove or disprove any of the issues in this case.

WITNESS.—Yes, sir.

Mr. CLARK.—Q. And delivered to the persons named?

Mr. RICHARDS.—The same objection.

WITNESS.—Yes, sir.

Mr. CLARK.—We offer this in evidence as Defendants' Exhibit 10.

Mr. RICHARDS.—Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case; and further, that the witness has not shown that he is qualified to state that that is correct.

Mr. CLARK.—Q. What is the present cost of mining that coal, per ton?

Mr. RICHARDS.—That is objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case. Conditions may be very different mining to-day than at

the time in issue.

Mr. CLARK.—Now you may answer the question, Mr. Miller.

A. The cost of mining is $2.00. We are paying $2.00 for mining it and running it and dumping it in the chute and—

Q. That is, $2.00 a ton, you mean?

A. Yes. That is just for the mining, not for cleaning. We are cleaning it outside. We pay $3.00 to one man and $3.50 to another, and they clean all the way from 6 to 14 or 15 tons. I figure that we can afford to contract that at—that is, a man could afford to take the contract, labor at 75 cents a ton, and make $4.00 or $5.00 a day on it, if he worked continuously on it.

Mr. RICHARDS.—I move to strike out the last portion of the answer as not responsive to the question.

Mr. CLARK.—Q. Then what do you estimate the cost of mining, sorting, cleaning and delivering at Salmon City, the nearest market, at the present time, of this coal, per ton?

Mr. RICHARDS.—Objected to as not proper cross-examination, and as not tending to prove or disprove any of the issues in this case, and it is incompetent, irrelevant and immaterial.

WITNESS.—The cost is $2.00 for mining, and about 75 cents for cleaning, and 90 cents for hauling.

Mr. CLARK.—Q. Have you always been able to sell all the coal you produced? A. Yes, sir.

Q. Could you have sold more coal while Mr. Rich-

(Testimony of F. C. Miller.)

ards was Manager of the mine, if you had been able to produce it?

A. Well, of course, I don't know. We were behind in our orders there some of the time, and no doubt I presume we could.

Q. Well, to what extent were you behind?

A. Why, we were behind there one time about 18 orders.

Q. Are there other places in the mine than those you are now working on, where coal can be produced?

A. Yes, sir.

Q. What places are there?

Mr. RICHARDS.—Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case.

WITNESS.—We could mine coal out of our slope, and, after developing it sufficiently, we could run cross-entries, and run rooms, and work the lower portion of our vein down towards the lower part of the ranch, underneath the ranch. As it is we just work the upper portion of our vein, that that is above the tunnel—the tunnel pitches downward about 24 degrees.

Mr. CLARK.—What per cent of increase would you say could be obtained there, by opening up the mine, and working where it is practicable to work, without injuring the mine?

Mr. RICHARDS.—Objected to for the same reason given above.

WITNESS.—Well, it would be a matter of tonnage that would be necessary to supply the demand.

(Testimony of F. C. Miller.)

That could be opened up to an extent where it would be quite an output.

Mr. CLARK.—Q. Well, about what would you say?

A. By running down the plane. Well, it all depends on what the output should be. We could run that output to 500 tons a day, if necessary. It all depends on the equipment you would put on the mine.

Q. That is to say, you mean to say there is sufficient coal there so that you could run the output up to 500 tons a day, if there was sufficient demand?

Mr. RICHARDS.—The same objection.

WITNESS.—Yes, 500 tons.

Mr. CLARK.—Q. Then, as I understand, Mr. Miller, as a matter of fact the production of that mine is measured by the demand for the coal?

A. Yes. We haven't been operating it any different.

Q. Now, do you supply and have you always been able to supply the coal furnished to the Salmon River vicinity? A. No, we haven't.

Q. That is, you mean you haven't been able to supply enough?

A. No, we haven't supplied enough; we have been behind in our orders.

Q. Have you been able to receive orders for all that you were able to supply?

A. Well, during the summer months it has been; but during the winter months we haven't never filled our orders.

Q. Then you have been able to sell all that you

(Testimony of F. C. Miller.)

have supplied since you have been superintendent of the mine?

A. Yes; we have sold all that we have mined.

Q. Salmon City is not in a very favorable place to procure coal from other places, is it?

A. No.

Q. And the mine you have is practically the only mine in that vicinity?

A. It is about the only one.

Q. Have you any knowledge of coals burned by railroad companies?

A. Well, not in particular, only what I have read.

Q. Do you have any knowledge of any coals sold in Montana for railroad purposes?

A. Well, I don't exactly know the analyses of the coals that are used for railroad purposes in Montana; it would only be approximate; I would have to guess at that.

Q. Have you seen any coal of this character before that has been used by railroad companies?

A. Well, there is a coal mine in San Cooley that the Great Northern burns that I know contains a great deal of rock and ash.

Q. And how does it compare in looks with this coal?

A. Well, I have seen a lot of it that didn't compare with that sample at all—very rocky.

Q. Has your mine been furnishing coal to the railroad that was building into Salmon?

A. Yes, sir.

Q. For what purpose?

(Testimony of F. C. Miller.)

A. For running a drag-line, or dredge.

Q. For their engines? A. Yes.

Q. About how many tons a month?

A. Why, we have just started to furnish them the latter part of November. We sent them a little sample in October of last year, and supplied them from the latter part of November until up to the time we left Salmon.

Q. You have been supplying them with coal from November until the time you left Salmon?

A. Yes.

Q. Do they have an order for any certain number of tons?

A. Why, they will take all we will give them.

Mr. RICHARDS.—When was this, Mr. Clark?

Mr. CLARK.—This last year—1909.

Mr. RICHARDS.—We object to this testimony as having nothing to do with any of the issues in this case.

Mr. CLARK.—I desire to say, and put it into the record, that Mr. Forrester in this case testified, at the instigation of Judge Richards, that this coal was absolutely valueless; that no coal in it could be used for any commercial purposes, and particularly that none of it could be used for railroad purposes.

Mr. RICHARDS.—That doesn't make it competent.

Mr. CLARK.—Well, we think it does.

Q. How many tons per month have you been furnishing them?

Mr. RICHARDS.—All this line of testimony is ob-

(Testimony of F. C. Miller.)

jected to for the same reasons; and I suppose that counsel will consent that it may all go to that same class of testimony?

Mr. CLARK.—Yes.

WITNESS.—Why, I think they have hauled away something like 100 tons last month. I don't know the exact amount; it is about that, I believe, somewhere.

Q. I will ask you this question: Is the coal that you mine from that mine, when sorted, good merchantable coal?

A. Well, we have burned it at home, and it has given us very good satisfaction. Of course, it doesn't compare with a great many other coals—good coals—but nevertheless it does very well, and there is lots of heat and considerable fixed carbon and volatile matter, and it makes a very good domestic fuel, particularly in our locality; we are well satisfied with it.

Q. What has been your experience in conducting that mine there; has the coal and the prospects of the mine become better or worse as you go farther in?

A. Well, if we work towards the boundary line, it is a little broken up there. Whether that would be an indication that it would be so farther in is a question I can't see any farther than anybody else can. But all the way along the left of the entry as you proceed in the coal continues all the way, and there are no breaks along there. It looks very good; it looks as though down that distance we would get a pretty good bed of coal.

Q. Did the coal improve any or not when you ran the slope down on the lefthand side?

(Testimony of F. C. Miller.)

A. Yes; that was better coal down in there—better coal than we have had any time I have been up there.

Q. And when was it you ran that slope?

A. This last fall.

Q. And have you opened that out yet?

A. No. There is considerable water in it, and we have no pump. We just worked it by hand down to a distance of 45 feet, and suspended it.

Q. As a matter of fact, your mining operations there have always been conducted on rather a small basis? A. Yes, sir.

Q. And in rather a crude way?

A. Yes. We never operated it with machinery; it has all been hand-work.

Q. How about the lower tunnel that you started on?

A. We struck some nice coal in that. We are selling coal out of that now, every day. There are two men working in it.

Q. About what is the average production of this mine per day at the present time?

Mr. RICHARDS.—Objected to as improper cross-examination, and also that there is no evidence to show the condition of the mine, as compared with the time at issue.

WITNESS.—All the way from 7 or 8 tons to 17 tons.

Redirect Examination.

(By Mr. RICHARDS.)

Q. When you spoke of the cost of coal, as I recol-

(Testimony of F. C. Miller.)

lect it, of $2.75 and 90 cents—

Mr. CLARK.—We wanted to offer that coal in evidence; I don't know whether we did or not.

Mr. RICHARDS.—Well, I don't know, Mr. Clark.

Mr. CLARK.—Well, will you permit me to do that now?

Mr. RICHARDS.—Yes.

Mr. CLARK.—We offer in evidence Defendants' Exhibit 10.

Mr. RICHARDS.—Q. In reference to the cost, where you say it is $2.00 for one item, and 75 cents for another item, and 90 cents for another item, what do you include in the entire cost? Do you include the management and the superintendence, and all that cost?

A. I included mining, and I included the cleaning of it and the delivering of it to the customers.

Q. When you say mining, do you include the timber? A. We furnished the timber.

Q. Well, I say, did you include the cost of the timber? A. Yes.

Q. In that?

A. In the 75 cents, it would pay for the timber.

Q. Do you include the cost of the powder?

A. That is included in the $2.00.

Q. Do you include the cost of sharpening?

A. That is included in the $2.00.

Q. Do you include the superintendence?

A. No, I didn't include that.

Q. Did you include the expense of running your drifts in ahead?

(Testimony of F. C. Miller.)

A. No. That comes under entry work.

Q. Well, isn't that a part of the expense that should be estimated in the cost of production?

A. Well, on the whole, yes.

Q. And that would add considerable to the cost you have mentioned, wouldn't it?

A. Yes, that would add to the cost some.

Q. You are not prepared to say just how much?

A. No, not at this time. We haven't been working it extensive enough to tell.

Q. Did you fill, while Mr. Richards was there, all the orders? A. No.

Q. You couldn't—

A. That is, we supposed we did; but we were always behind.

Q. Well, did you fill those that you were behind on?

A. Well, we cut some loads to fill them; so we didn't fill them as they were ordered.

Q. Why didn't you fill them?

A. Well, we were driving entry then, and we were getting most of the coal from this entry.

Q. There was coal there to fill the orders with, wasn't there?

A. Yes; but we hadn't had entry work enough done so that we could fill them.

Q. Did you finally fill the orders?

A. Why, I am impressed that we did.

Q. You have no knowledge of your own as to the quality of coal required for locomotives, have you?

A. The quality?

(Testimony of F. C. Miller.)

Q. The quality—yes?

A. Well, I do know this; that it requires considerable fixed carbon.

Q. Well, I say, you have no particular knowledge as to the character of coal required for locomotive use, have you? A. No, not particular; no.

Q. Do you know anything about whether, in burning this class of coal, they are not required to have specially constructed fireboxes? A. Yes, sir.

Q. So its value would depend somewhat on the condition of the engine to use it, wouldn't it?

A. Yes; it depends on how the engine is built.

Q. Do locomotive coals require more of the fixed carbon than other uses?

A. They are better to have fixed carbon—more fixed carbon.

Q. More than this coal contains, probably?

A. Well, it is desirable to have it so.

Mr. CLARK.—Q. You say the engines which burn this character of coal have to have especially equipped fireboxes?

A. Yes, sir.

Q. They could burn it if they had those?

A. Why, yes; they could burn it with a specially equipped box.

[Testimony of Arthur H. Lamborn, for Plaintiffs.]

ARTHUR H. LAMBORN, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. RICHARDS.)

Q. You are one of the plaintiffs in this case, Mr. Lamborn? A. Yes, sir.

Q. Where do you reside?

A. My home is in Montclair, New Jersey.

Q. And how long have you lived there?

A. Over eight years.

Q. When did you first become acquainted with Mr. Richards, your coplaintiff in this case?

A. I think it was in the second week of February, 1907; it was either in the second or third week.

Q. And where did you become acquainted with him? A. At Macozari, Mexico.

Q. And how long were you with him there at that time? A. Fourteen days, I think.

Q. You camped and traveled together through Mexico during that time?

A. Yes, sir, we did.

Q. When did you first hear about the coal mine in controversy here?

A. During the first week of June, 1908.

Q. From whom? A. Mr. Richards.

Q. I wish you would state whether or not he showed you a letter, which he has said was lost with his satchel and the contents, to which he has testified here? A. He did.

(Testimony of Arthur H. Lamborn.)

Q. Did you see a telegram, which he has testified was lost also, from Mr. King?

A. I did. I sent up for it. I think it was delivered to the Park Avenue Hotel, and I sent one of my messengers up for it.

Q. When did you first see the—what we call the agreement or option which has been introduced in evidence here, between Mr. King and Mr. Richards?

A. I think the second day of Mr. Richards' visit to New York.

Q. What was the general plan submitted to you by Mr. Richards, relative to the purchase of the King property, at that time?

A. Well, I can't truthfully say that he submitted any plan to me. He had been invited by me when I left him in Mexico to come to New York, and also to my home, and he said maybe he could come down and stay. He had been in Cincinnati and Washington, and that he came to New York with the idea of not only visiting me, but asking my help in introducing him to some people in regard to a coal proposition. I think this was the second day he was there. The first day we spent (what little time I could give him) in the office, and in the evening at the theater; and the mention of the contract was not made until the following day.

Q. Well, when did you go to Salmon first to see the property?

A. Well, I haven't my file in the room, but I think I left New York about the 19th or 21st of July, 1908.

Q. About what time did you arrive at Salmon?

(Testimony of Arthur H. Lamborn.)

A. About the 26th, I believe it was, of July.

Q. Do you remember what day in the week?

A. Sunday afternoon.

Q. How did you come to do there? Just what was the—

A. Well, I had been importuned very strongly by Mr. Richards, both when he was in New York, and also when he returned to Salmon, by telegram,—

Q. He returned to Salmon, then, before you went to Salmon?

A. Yes—about thirty days before.

Q. Upon what basis, so far as you and Mr. Richards were concerned, did you enter into these negotiations?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—When I left Mr. Richards in Mexico, he had appealed very strongly to me as a man, and I formed a very deep attachment for him, and during the year or more following I had heard from him from two different points in the United States, wherever he was at, either on his farm, or at some mining division, or at Salmon; and when I left him in Mexico I told him if he ever came across any proposition which appealed to him strongly, that I would be glad to take it up. And when he came to New York he didn't ask me to go into this proposition, first; he asked me rather to introduce him to some of my friends, or to some banking-house, so that he could take it up with them. I told him it was too small to take it up with some of my banking friends,

(Testimony of Arthur H. Lamborn.)

and if he would explain it to me I might go into it myself, and he did so that morning. He told me the proposition would pay interest at six per cent, and based his statement at six per cent on $100,000.00, and based his statement on a letter he had received some days before in Colorado from Mr. King. He told me the property could be bought in its entirety for $80,000.00, and, possibly on account of his having a commission, that he could buy it for considerably less; that he hadn't thought of it to the extent of going into it definitely; that he had thought that King and himself would want to retain an interest, on account of the probability of a railroad going through there; but if I would go in with him he would go back to Idaho and get the very best deal he could, and if it was necessary and we couldn't swing the whole proposition ourselves, that he would try to induce Mr. King to keep a quarter interest. He showed me a telegram —I mean a letter—that he had received at some point in Ohio, saying that the tonnage had been 2,300 tons for a period of from the previous September up to the time this letter was written, I think in either April or May.

Q. That is one of the letters introduced in evidence?

A. No, this letter was not introduced in evidence; this is the letter that was lost.

Mr. CLARK.—I move to strike out the answer of the witness as being incompetent and immaterial.

Mr. RICHARDS.—Q. Is that the letter that he testified to himself, as to the contents?

(Testimony of Arthur H. Lamborn.)

A. Yes; he has testified that that is lost. I told him that I wasn't satisfied with the way in which this letter was written; it wasn't written in a business-like way, but it was a statement from one friend to another friend, apparently. But I told him if we were figuring on a larger capacity, a difference of five or ten per cent less than a given amount wouldn't make much difference. But in a general sense it was 2,000 tons, and I wanted to know exactly what it would be; and the reply came back that it had been 2,300 tons. That was received, I think, about the 10th or 11th or 12th of June.

Q. Now, what relative basis between you and Mr. Richards were you to go in on this?

A. That was not definitely settled until we rode in from Red Rock to Salmon; and in a way which I felt was sufficient to satisfy me, I pledged him that whatever basis he went into this deal on I was to share with him on exactly that same basis.

Q. So far as you know, have you shared in that respect so far?

A. As far as his intent is concerned, I am perfectly satisfied of it, and have been at all times.

Q. Now, when you arrived at Salmon, how soon after you reached there did you meet Mr. King?

A. I think somewhere about three o'clock in the afternoon.

Q. Did you visit the mine that afternoon?

A. Yes.

Q. Did you go into the workings?

A. I don't think we entered the workings, though,

(Testimony of Arthur H. Lamborn.)

that afternoon; if we did, we were only in a short distance—probably 25 feet—not more than that.

Q. Well, you looked that over generally?

A. Yes, sir.

Q. When did you next visit the mine to look at it?

A. I would like to qualify that previous answer. I have tried to search my mind, and that is my best recollection and belief.

Q. Well, when did you next visit the mine?

A. On the following morning.

Q. Did you go into the workings?

A. Yes, sir; as far as we could go.

Q. How far did you go?

A. It seemed to me about a thousand feet; but I believe Mr. Richards agreed with Mr. Miller that the distance was a little over 200 feet.

Q. Just describe how that looked to you as you went in there?

A. Well, at the opening of the portal it looked like a general conglomerate in vein matter, but not sufficient coal to warrant any enthusiasm. When we got into the property farther, in a casual way I observed that the width of the coal vein seemed to be increasing, and of course that is what appealed to me more than anything else, because I was there to find coal. When we got into the breast of the vein, the upper strata was very much like the entrance to the portal; it was a mixture of sand and a dead black deposit that looked like slate. The coal was not in any considerable quantity. I am speaking of the upper vein

now. Between this upper vein and a lower vein there was, I should judge, 12 to 14 or 16 inches, perhaps more or less by two or three inches.

Q. When you speak of the upper and lower vein, was that in the same breast?

A. Yes, sir, of sandy clay; and underneath this clay there was a similar deposit as above, except that the coal was more pronounced; and at the bottom of it, which they did not reach on the level of the floor, where the car track was, Mr. Miller had blasted quite a hole, and there was a deposit as far as I could reach it; it felt like to me (and I presumed it was, and he said it was) of coal of this brighter material; and Mr. Miller said it was about 14 inches in thickness.

Q. What effort did you make to go on into the other workings?

A. The lights became dimmer and dimmer all the time, and I don't hesitate to say I was quite nervous. The cracking behind us of the new workings was more or less terrifying—not exactly that, but it made me nervous, and the lights became dimmer and dimmer, and finally went out. We relit them, and Mr. Miller suggested that Mr. Richards should not try to go into the old workings, because he said the room was falling. Just about the time he made this statement a lot of rock fell with a perfect crash, and I can safely say it was terrifying to me. Richards did go in there, but I called him back, and he was probably in there for the space of about two minutes.

Q. That about covered the investigation you made at that time?

(Testimony of Arthur H. Lamborn.)

A. I think it covered all the investigation that I made, except I went back in a very nervous way. I don't think I went clear to the breast, and all the time I stayed in there was very short.

Q. You looked over the outside surface somewhat?

A. I went all over it.

Q. When did you have any conversation with Mr. King, with reference to purchase, after visiting it?

A. I met him on Sunday afternoon in a social way, and just a few moments at the mine; and on the following evening, after taking dinner at his home, we and Mr. Richards sat on the porch and discussed the matter for probably two hours.

Q. I wish you would state what he said relative to the production of the property for the previous 11 months, if anything?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—He reiterated the statement he had made to Mr. Richards in writing, and stated that he had produced and sold and delivered 2,300 tons and more in the City of Salmon, in addition to which he had produced, sold and delivered 300 tons to the Copper Queen mine, some 30 or 40 miles away, and that he had the anticipation of delivering a very much larger quantity to them, because they had shut down after using this quantity and expected to open up again.

Mr. RICHARDS.—Q. What statement did he make relative to the workings that you were not able to investigate because of the bad air and—

(Testimony of Arthur H. Lamborn.)

A. I called Mr. King's attention to the upper vein, and he told me that in the old workings the quality of the coal was exactly like they were delivering in town, and that it didn't need sorting. At that time they were not delivering, but he said there was some in the bins, and we examined that.

Q. What did he say as to the face of the breast you couldn't see being that kind of coal?

A. He said it was clean coal. He said the whole breast was five and a half feet of clean coal; he pointing out the fact that as we went into the tunnel the seams became wider and wider; he said that eventually would come out in the same way that they had in the old workings.

Q. Well, what did he state in general about the property, and the basis upon which he would sell?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—We discussed at considerable length the proposition to retain him as a fourth partner. We did not at that time discuss any question of a corporation, but more in the sense of a partnership, although we had not any definite plan at that time, whether it would be a partnership or a corporation, and my idea was that Mr. Richards and myself should pay $30,000.00 in cash, which was the price which he had paid for this property, according to his statement to me, and that would put him just where he had started in; that $30,000.00 we should put on the working of the property, he claiming that the property was paying a dividend on $100,000.00 capital; and

(Testimony of Arthur H. Lamborn.)

he also stated that the net profit on all the coal was $3.00 per ton. We figured that the interest on $80,000.00, based on the proposition he was willing to sell for, would be $4,800.00. And we went to his band on the following day, after dinner, and went into detail as to just what the net profit would be, on the basis of the tonnage he had had—not on the natural increase of tonnage when seeking new customers, but simply on the basis of the old ones using the coal; that that was sufficient to bring the tonnage; but that if we would press the customers the tonnage would be increased, and we figured that with a railroad coming in we could work up to 2,000 tons. We next figured 3,000 tons for the City of Salmon; we figured together on just what would be the net return.

Q. The figuring was based on whose statements?

A. On Mr. King's statement that it had been 2,000 to the City of Salmon.

Q. Upon what basis did you agree to enter upon the purchase of the property?

A. He told me that he would be willing to come in. He said, "I can simplify this matter for you; instead of taking $30,000.00 out of the workings of the company, if you will put up $30,000.00 and wait, it will be a couple of years before you will get on a dividend paying basis; and to simplify it for you, if you will put up $30,000.00 in cash by the first of January, and $10,000.00 in bonds, at such time as I will make convenient for your payment, I will take a quarter interest in the property; and for the other $20,000.00, instead of taking it out of the property, I will take

(Testimony of Arthur H. Lamborn.)

bonds for it."

Q. And then what arrangement as to a bond issue did you arrive at?

A. That the total bonding of the company should be $80,000.00; that is, to take over the property as it then stood,—

Q. And what proportion were you to have—the same as stated in the contract?

A. The contract reads to me $32,500.00. I have never been able to get it through my head, and I would be perfectly willing to take Mr. King's explanation of why it says $32,500.00 to myself and $7,500.00 to Mr. Richards. It has always been my idea that there should be $30,000.00 to myself, to cover the $20,000.00 cash and $10,000.00 notes, and $10,000.00 of Richards, to cover his payments, and $40,000.00 to Mr. King—$20,000.00 which he would naturally secure on account of his fourth interest, and $20,000.00 which he took in lieu of the profits out of the mine.

Q. Then upon that basis you entered into the agreement which has been introduced in evidence, and set forth in your pleadings?

A. With the slight exception that I say I have never been able to understand it, and I am perfectly willing to take the other side's explanation of it.

Q. What condition did you find Mr. King in, relative to his business relations and social relations and standing in that community, when you arrived there?

A. He was President of the First National Bank; he had a delightful home and family; he entertained

(Testimony of Arthur H. Lamborn.)

me at his home; I met his friends, some of the most influential citizens of Salmon. I took occasion to ask, in as delicate a way as I possibly could, of almost all of the influential citizens there, relative to his standing, and they represented it as the highest in the town; and his general attitude and the attitude of his family toward me, indicated that he, in that community at least, was at the height of the local business and society.

Q. Taking all these matters into consideration, to what extent did you rely upon his statements in entering into this contract?

A. Well, Mr. Richards had previously told me all that I have here stated, and all that I found there regarding Mr. King, and on account of the character of my business I did not want to come west; but when I came here, and Mr. King reiterated the statements he had made to Mr. Richards in writing, and after I found he occupied the position which Mr. Richards had stated, I relied upon him just the same—in fact, we talked in such a manner that within 40 hours from the time I arrived in Salmon I felt that Mr. King was my friend, associate and partner.

Q. What induced you, then, to enter into this contract? A. My confidence in Mr. King.

Q. And upon that basis you made the contract?

A. I did.

Q. After making that contract did you receive letters from Mr. King?

A. Yes, sir; I received a number of letters from him.

(Testimony of Arthur H. Lamborn.)

Q. At the time you entered into the contract, you made the payments, as admitted by the pleadings here, I believe?

A. I gave him a check for $5,000.00, which afterwards he returned to me, or through the bank in New York, because my office in New York had already deposited $5,000.00. Now, either that, or else the office withdrew my check. How is it, Mr. King?

Mr. H. G. KING.—Yes, that was it. You had placed the money there, and the check was returned to you.

Mr. RICHARDS.—Q. (Paper shown witness.) You may state what that is.

A. It is a letter addressed to "Friend Lamborn" —myself; dated October 27th, 1908, and signed H. G. King.

Q. You received that in due course of mail?

A. Yes, sir.

Mr. RICHARDS.—I offer this as Plaintiffs' Exhibit "L."

Mr. CLARK.—No objection.

Mr. RICHARDS.—Q. (Paper shown witness.) State what that is.

A. Addressed to A. H. Lamborn, New York City. "Dear sir and friend." Dated Salmon, Idaho, November 27th, 1908. Signed H. G. King.

Q. You received that in due course of mail?

A. I did.

Mr. RICHARDS.—We offer this in evidence as Plaintiffs' Exhibit "M."

Mr. CLARK.—No objection.

(Testimony of Arthur H. Lamborn.)

Mr. RICHARDS.—Q. (Paper shown witness.) You may state what that is.

A. A letter dated Salmon, Idaho, November 7th, 1908, addressed to A. H. Lamborn, "Dear sir and friend"; signed H. G. King.

Q. You received that from Mr. King in due course of mail? A. I did.

Mr. RICHARDS.—We offer this in evidence as Plaintiffs' Exhibit "N."

Mr. CLARK.—No objection.

Mr. RICHARDS.—Q. (Paper shown witness.) You may state what that is.

A. A letter dated Salmon, Idaho, December 2, 1908, addressed "Friend Lamborn," and signed H. G. King.

Q. Did you receive that from Mr. King in due course of mail? A. I did.

Mr. RICHARDS.—I now offer this in evidence as Plaintiff's Exhibit "O."

Mr. CLARK.—No objection.

Mr. RICHARDS.—Q. Up until subsequent to the time you made the payment to Mr. King in January, 1909, had you any reason to doubt the correctness of Mr. King's statements to you?

A. None whatever.

Q. When did you first have called to your attention the fact that the statements he had made to you, and upon which you say you relied, were not true?

A. I think somewhere around the 20th of January.

Q. In what year? A. 1909.

(Testimony of Arthur H. Lamborn.)

Q. Upon what percentage investment basis did Mr. King say that the property would pay, relative to the production he had stated to you?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—When I came to Salmon I specifically asked him to show me just exactly what interest—not dividend, understand—but what interest on the bonds this would pay; and he figured out that on the 2,300 tons that it would pay $7,800.00 on the total production that he had had; that six per cent on the amount of bonds that we would issue to ourselves on this property would require $4,800.00, and the balance would go to working capital, developing the property, and getting it in a position so that if a railroad ever came through there we could mine it much faster than the consumption of Salmon, Idaho, would take.

Q. And you invested your money and entered into a contract on that basis? A. I did.

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Lamborn, what is your age?

A. 38.

Q. What is your occupation?

A. Sugar broker.

Q. In what city?

A. That I am engaged personally, you mean?

Q. Yes? In what city are you engaged in business?

A. In New York City. I have other offices, but

(Testimony of Arthur H. Lamborn.)

in New York City I am located.

Q. And where do you have other offices?

A. As A. H. Lamborn & Company I have offices in Philadelphia; as the leading stockholder of the A. H. Lamborn Company I have offices in New Orleans.

Q. You consider yourself, then, rather an extensive stock broker?

A. I am not a stock broker, not in any sense of the word.

Q. Well, a sugar broker?

A. I am a sugar broker.

Q. What are the duties of a sugar broker?

A. To sell the actual article—no speculation whatever.

Q. I understand that; but I used the word, probably, inadvertently. You act as a seller of sugar for manufacturers? A. For sugar refineries.

Q. And you have quite an extensive business in that line? A. Yes, sir.

Q. And you, of course, are a business man? You understand business matters?

A. I presume I might go that far.

Q. Yes; you must be in order to carry on your business. Now, when Richards came to New York, you say you stated to him that you were perfectly willing to rely on his judgment?

A. Yes, I did—not on his judgment of the mine, though.

Q. You were perfectly willing to say to him, "Mr. Richards, go and close this deal, if you want to"?

(Testimony of Arthur H. Lamborn.)

A. On Mr. King's statements, as given in his letters.

Q. You didn't know Mr. King, though?

A. No, sir, I didn't.

Q. And as to any representations as to Mr. King's standing in that community, you had to depend on Mr. Richards? A. I did.

Q. And from what Mr. King said—or what Mr. Richards said of Mr. King, and what Mr. Richards said of the mine, and what Mr. Richards said Mr. King had stated, you were willing to close the deal at that time, were you?

A. I would like to answer specifically yes; but I would like to also put in here that I asked Mr. Richards particularly if he had any knowledge of coal mining, and he stated that he never had had any experience whatever; but he stated that Mr. King's statement in regard to the production and sales in Salmon, and his standing as the President of the bank, and his letter stating that the business at that time was paying interest at six per cent on $100,000.00, yes.

Q. Well, you then were ready to close the deal before you left New York City?

A. No, not until we knew— No, we couldn't have closed it, because Mr. King's proposition on the mine hadn't been what he subsequently made to Mr. Richards and myself, which made it much easier for us to handle the deal.

Q. So you entered into a new agreement?

A. Well, with that difference in the arrangement

(Testimony of Arthur H. Lamborn.)

—a variation of the original arrangement.

Q. Now, under this new arrangement which you say you finally entered into, Mr. King was to get merely the $30,000.00 that he had paid for the property, in cash?

A. He was to get in cash $30,000.00—well, I don't know what his arrangements were with Mr. Richards; but he was to get from me $20,000.00 in cash and $10,000.00 in notes, which was as good as cash if his statements to me were correct.

Q. And an $80,000.00 bond issue was to be floated, covering the entire property?

A. As it then stood.

Q. And out of that bond issue you were to have $32,500.00?

A. The contract so states, but, as I said, I am perfectly willing to leave it to Mr. King to state how it got in there, and I signed it without observing that—that it said $32,500.00.

Q. You understood that you were to get $30,000.00? A. Yes, sir.

Q. In bonds?

A. In bonds, and a half interest in the property.

Q. And also two-thirds of the amount of bonds that Mr. Richards was to get?

A. I knew nothing about any specific amount of bonds that Mr. Richards was going to get.

Q. Well, did you know he was going to get any?

A. I didn't know he was to get any.

Q. Did you know that you were to have any interest in whatever he had?

(Testimony of Arthur H. Lamborn.)

A. Yes, I knew I was to get a part of whatever he was to get—before I ever went in there I understood it.

Q. Then you understood that Mr. Richards was getting quite a large commission for selling this property?

A. I didn't know just what his commission would be on our deal. He stated that he was to receive $25,000.00 if he sold that property for $80,000.00 cash.

Q. And you understood that you were to get a proportion of the Richards commission.

A. You will please understand, Mr. Clark, that when Mr. Richards came to me he had no knowledge that I would go into this—he had no belief that I would go into that.

Q. Well, if you will kindly answer my question: You understood that whatever commission Mr. Richards got, you was to have a two-thirds interest in it?

A. I was to have an interest in it in proportion to whatever interest he took.

Q. So when you closed the deal, you was to have two-thirds of whatever interest he got of Mr. King's?

A. We were to get two-thirds—

Q. Well, we can get along a little faster, Mr. Lamborn, if you will just answer my question. Now, when you closed this deal, did you or did you not know that Richards was to have a commission on the sale?

A. I presumed that he was to have some commission; but I wasn't positive of it.

(Testimony of Arthur H. Lamborn.)

Q. Did he tell you what his commission was to be?

A. When he came to New York he told me that his commission was to be $25,000.00 in case he sold the property for $50,000.00. In discussing the matter, coming into Red Rock, I said, "Richards, if I go into this matter I am going into this matter on your statements," and Mr. Richards said, furthermore, "You will go into it on the same rock bottom basis."

Q. If he went into it, he was to share whatever he got out of it with you? A. Yes, sir.

Q. So that, if his statement was correct, if he was to get $32,500 of a bond issue, you were to have two-thirds of that?

A. I don't know that he has testified to $32,500; but whatever profits he got I was to share with him, proportionately.

Q. Then all that Mr. King was getting out of this was the original cost price, and $15,000.00 of the bonds of this company, the same as the bonds that you gentlemen were getting, and a fourth interest in the property?

A. And a fourth interest in the equity, yes, sir.

Q. And all the net profit he was getting out of it was a fourth interest in the property?

A. And $15,000.00 of the bonds. But I didn't know at that time what the interest would be, and I didn't know there was any interest at that time.

Q. You were getting close to $50,000.00, weren't you?

(Testimony of Arthur H. Lamborn.)

A. Oh, I don't know that I was getting close to $50,000.00.

Q. So if you put in $30,000.00 you would be a good deal ahead on the proposition?

A. Well, I would be perfectly justified in getting ahead whatever I could. I have bought bonds at .60 and .75.

Q. In other words, this was what was called in New York City a little piece of high finance, wasn't it?

A. That was not; and that is not a fair statement to make.

Q. Now, you say he figured six per cent on how much investment?

A. He figured that the property would pay $3.00 per ton on the 2600 tons he had mined.

Q. And what was the amount you was figuring the investment to be?

A. We figured our investment at $80,000.00. He claimed the property was worth that.

Q. So you were going to issue $80,000.00 bonds, and you figured this production would pay you six per cent on that?

A. And more than that. We figured at least on his figures $3,000.00 for working capital.

Q. So that was the basis on which you entered into this arrangement?

A. On his statement, yes.

Q. On his statement?

A. Yes—made to both Richards and myself.

Q. Well, now, if that mine could produce 2,300

(Testimony of Arthur H. Lamborn.)

tons, and it could be mined for $3.00 a ton, why it would pay you six per cent on that investment, wouldn't it? A. Yes, sir, it would.

Q. And so if that should be the fact, there wouldn't be any loss or damage to you by any statement made by Mr. King, would there?

A. Well, if his statement had been correct, I would have been satisfied.

Q. If the mine had not produced it, but would produce it—

A. I beg your pardon—I went into this as an investment on the basis of what it had produced; not what it would produce.

Q. Well, why should you object? If the mine produced 2,300 tons the next year why should you object to it, that it had produced—

A. I don't think that is relevant at all. I don't think you have a right to interrogate me as to what it might be this year, or five years from now.

Q. Well, that may be a question between you and me, Mr. Lamborn. Now, if the year after you went in there the mine, by proper management, could have produced 2,300 tons, what damage would you have suffered by reason of the fact that Mr. King stated that it had produced 2,300 tons the year before?

A. If I had never known that Mr. King had falsely stated that, it would not have damaged me at all.

Q. Then his mere statement would not have damaged you, other than it might have shaken your confidence in Mr. King? A. That's all.

(Testimony of Arthur H. Lamborn.)

Q. Now, have you made any personal investigation there to find out what the value of this property is?

A. I have told you what investigation I made personally. I called on Mr. Richards for further information, and he said that he went over the statement again, and found that Mr. King had not produced 800 tons. That was sufficient to show me that Mr. King had misrepresented the property to me.

Q. And you rested on that statement?

A. I certainly did. Mr. Richards said that he had all the stubs from the property, and they showed less than 600 tons; and he also stated that he had Mr. King's letter saying that he had produced less than 300 tons during the period he had had it prior to this time.

Q. Do you ordinarily buy real estate, Mr. Lamborn, merely on some fellow's statement of how much it produced in a year?

A. I have bought very little real estate. What I have bought I have had very carefully investigated by lawyers; and we had this investigation by lawyers, to have the title searched.

Q. Do you ordinarily buy real estate on what people tell you?

A. I haven't bought real estate—

Q. Do you ordinarily buy any—

A. The search of this title would have disqualified the sale, if it proved that the title was not clear.

Q. Do you ordinarily buy property on what peo-

(Testimony of Arthur H. Lamborn.)

ple tell you, or on your own judgment?

A. Well, I have bought real estate in Montclair on what people have told me.

Q. Old friends of yours?

A. Well, I will say a personal friend of mine of many years' standing. I subsequently sold that, on the advice of another man that I had been acquainted with in Montclair.

Q. But you went and looked at the property?

A. And so I did in this case.

Q. You came there for that purpose, didn't you?

A. Well, I may admit that I came there for that purpose; but I was practically dragged there.

Q. By Mr. Richards? A. Yes, sir.

Q. Mr. Richards insisted that you come out here and look at that property?

A. Well, he urged me, yes;—make it "insist," if you please.

Q. And you didn't sit down in Mr. King's house and just listen to what he said; you went up to the mine, didn't you? A. Yes.

Q. And you looked around there, and from what you could see it looked pretty good to you, didn't it?

A. Well, now, I'll tell you: I am willing to say that from the statements made by Mr. Richards and the letters which he produced from Mr. King that I was willing to take the statements of Mr. Richards. When I was up at the mine I wasn't enthusiastic over it—Mr. King knows I wasn't enthusiastic over it.

Q. Did you talk to anybody except Mr. King

(Testimony of Arthur H. Lamborn.)

when you were in Salmon?

A. The only person I talked to in Salmon—and Mr. King and Mr. Richards and myself agreed that we would not talk about the matter—

Q. Well, did you talk with anybody?

A. One man—Mr. Shoup.

Q. Did Mr. Shoup have any knowledge of this mine?

A. No, he had practically no knowledge of it. He said he had seen the coal, but he wasn't impressed with it, and he said he didn't know there was a mine there, and I told him of the tonnage that Mr. King said he had sold.

Q. And what did he say to that?

A. He said he was very much surprised—very much surprised.

Q. And that was before you entered into this arrangement? A. Yes, sir.

Q. Did you make any request for the stubs of the coal he had sold? A. No, sir.

Q. Did you ask Mr. Miller?

A. I asked Mr. Miller a number of questions, but he was very noncommittal, and acted like he didn't have a right to answer questions of a stranger. He was, however, courteous; that's all I can say. I did get him off on to coals in Montana, and he said that he had seen mines opened up there which didn't show as well as this property. But he acted just exactly like a man who was not going to speak to anybody without authority.

(Testimony of Arthur H. Lamborn.)

Q. Did you have any experience in coals yourself?

A. Not a particle, except the coals which are burned there.

Q. Well, did you know whether Mr. King knew anything about a coal mine or not?

A. I judge he didn't know anything more about a coal mine any more than I did; but he knew what number of tons he produced.

Q. You understood that this was not the best of coal? A. The best of what?

Q. The best of coal?

A. The best coal Mr. King had.

Q. I say, you understood that this was not the best of coal.

A. Yes, I did understand it was not the best of coal.

Q. And you understood that when you purchased the mine? A. Yes, sir.

Q. Did you understand that Mr. Richards paid $2,500.00 when you were there, when this agreement was executed?

A. Well, I can't say that I understood that he did. Mr. Richards told me that he had a ranch in Texas, and while he was financially embarrassed that he had money dealings with Mr. King, and Mr. King would make arrangements with him to carry him, which would be easier to him than to me. I presumed that Mr. Richards would eventually pay $10,000.00, either in cash or in notes, for this property.

Q. Did Richards have any of this coal with him

(Testimony of Arthur H. Lamborn.)
when you were in New York?

A. Yes; he had a sample of about a pound or two pounds, I think.

Q. Did you have it analyzed and tested?

A. Yes, I had it analysed.

Q. And you knew what it contained, so far as carbonaceous materials were concerned?

A. Well, I had it analysed for him and for Mr. King as much as for myself, because he said he would like me to get it analysed.

Q. And you saw the result of that?

A. Yes. It didn't compare with the Rock Springs coal, or with the anthracite of bituminous coals of the east.

Q. When was it you had that analysed?

A. Well, I couldn't tell you. I had it before I came out to Idaho.

Q. You saw it before you came out to Idaho?

A. Yes, sir. Mr. Richards telegraphed for a sample. He had a sample with him that was not of the character he wanted to have analysed. He wanted to have that analysed, and another, and I think I had two samples analysed; one was a shiny coal, and another was a dark coal. Now, I won't swear to this, but I think we had both of them; but in any event I think Mr. King knows about it, because I took pleasure in showing it to both of them when I came out there.

Q. And when you came out to make this agreement you knew already what the composition of this coal was?

(Testimony of Arthur H. Lamborn.)

A. Not of the coal vein, but of the coal that was presented to me, which was a fine sample, just like this—which is a selected sample; I think you will admit that.

Q. Those were samples that Mr. Richards sent you?

A. No; I think Mr. King sent one sample, and Mr. Richards had a sample. I know he telegraphed to Mr. King to send a sample, and I know Mr. King sent a sample.

Q. And when you came here you found coal that satisfied you that you had had a fair sample of it?

A. Now, I don't say that I was satisfied with the coal which I saw in that mine as being a fair sample, or being a fair representation. I think it was more than fair. I think the coal was not as good in its entirety; but as to the sample, yes, it was coal that could have been gotten out of there, and undoubtedly was.

[Testimony of C. Albee, for Plaintiffs (Recalled).]

C. ALBEE, a witness heretofore produced by the plaintiffs, and duly sworn, being recalled by the plaintiffs, testified as follows, to wit:

Direct Examination.

(By Mr. RICHARDS.)

Q. What kind of satisfaction did that coal give that was delivered there to the Copper Queen mine?

Mr. CLARK.—That is objected to as incompetent and immaterial.

WITNESS.—It didn't give very good satisfaction.

(Testimony of C. Albee.)

Mr. RICHARDS.—Q. For what reason?

A. They required wood along with it.

Q. Of itself, it hadn't sufficient heat in it?

A. Of itself, it hadn't sufficient heat; yes.

Cross-examination.

(By Mr. CLARK.)

Q. Have you been using any of it since, Mr. Albee?

A. That I don't know anything about. The mine is closed down now. They certainly have not—come to think.

The further taking of testimony was thereupon continued until Tuesday, the 11th day of January, 1910, at nine o'clock A. M.

On Tuesday, the 11th day of January, 1910, at nine o'clock A. M., the further taking of testimony was resumed.

[Testimony of Arthur H. Lamborn, for Plaintiffs (Recalled—Cross-examination).]

ARTHUR H. LAMBORN, a witness heretofore produced on behalf of the plaintiffs, and duly sworn, being recalled by the defendants for further cross-examination, testified as follows, to wit:

Cross-examination (Continued.)

(By Mr. CLARK.)

Q. When was it, Mr. Lamborn, that you first became dissatisfied with the contract that you and Mr. Richards and Mr. King had made?

A. About the 20th of January, 1909.

Q. January 20th, 1909? A. Yes, sir.

(Testimony of Arthur H. Lamborn.)

Q. And what caused you to become dissatisfied with this contract at that time?

A. Well, I had written Mr. Richards that Mr. King had written me a letter stating that they were about, I think he said 19 or 21 loads behind orders, and Mr. Richards had written me stating that they were getting out from 10 to 12 tons per day, and I wrote and told him that even if they averaged ten tons for every day for 300 days that would not come up to the amount that we had expected to do during the year, and would very little exceed the amount which Mr. King had claimed he had produced the year before. I told him that I wanted him to look into it carefully to find out from Mr. King why there was any such discrepancy, and he came back with a telegram saying that the total tonnage—that we were deceived; that the total tonnage of the mine was about 650 tons.

Q. That telegram came from Mr. Richards?

A. Yes, sir.

Q. And that was about the 20th of January?

A. I think about the—anywhere from the 15th to the 21st or 22nd of January.

Q. Then the thing that caused you to become dissatisfied was the fact that it did not appear to you that ten tons per day would produce as much tonnage as Mr. King said the mine had produced the year before?

A. No—that wasn't it at all. I said that unless he produced ten tons per day, for all the days of summer included, that it would not very much ex-

(Testimony of Arthur H. Lamborn.)
ceed his statement. I was very well satisfied that ten tons per day in the winter time would not anywhere near equal it, and Mr. Miller had stated that there was no demand there in the summer time.

Q. Mr. Miller had stated that there was no demand in the summer time?

A. Yes. I asked him if there was. There was some coal in the bins, and I asked him how long it had been there—it was disintegrated. He said it had been there quite a while, and when it was exposed to the air it slacked; that there was no demand in the summer time of any kind.

Q. And you expected that the coal had to be sold during the winter months?

A. Yes, sir—largely.

Q. Had you, in connection with Mr. Richards, made some effort to dispose of the bonds that you expected to get?

A. No, sir—to the contrary, I had made no effort whatever to dispose of them, and had told Mr. King that we should not dispose of them unless we disposed of them in a lump. Well, the correspondence I have with him I am perfectly willing to put in, because there was no effort whatever on my part to dispose of the bonds.

Q. Did you know that Mr. Richards had made an effort to dispose of them?

A. No, sir. Well, he had written me that he had taken up the question of the bonds, I think with Mr. King, the testimony will show; but not with the idea of making any effort to dispose of the bonds;

(Testimony of Arthur H. Lamborn.)

just simply to see what could be done with them. Mr. King had written me about the bonds.

Q. Do you know that Mr. Richards didn't take this matter up with the idea in view of disposing of his bonds to certain parties in Ohio?

A. No, sir. I never heard of it until yesterday; that is, as far as Ohio is concerned. I knew that he and Mr. King had written in a general way—

Q. Well, that is not the question I asked you about.

A. Well, I knew nothing about him taking it up with any parties in Ohio.

Q. Now, along in January, when you discovered the fact that the mine was not producing as much as you expected it would produce, you refused to go further with this matter, did you?

A. I notified Mr. Richards to take the matter up with Mr. Cowen and Mr. King, and unless Mr. King could make good to proceed against him, not only civilly, but criminally.

Q. And you did proceed civilly, but not criminally? A. Well, that is not my fault.

Q. Well, it is never too late, I guess.

A. Well, sir, I hope not.

Q. Have you the letters that passed between you and Mr. Richards in regard to this matter?

A. I think so.

Q. Have you any objection—

Mr. RICHARDS.—I have them at the hotel.

WITNESS.—If you mean me, I have no objection to you seeing every letter I have written to Mr.

(Testimony of Arthur H. Lamborn.)

King and Mr. Richards, in regard to this transaction.

Mr. CLARK.—Q. Well, they are not here, then?

A. They are here. They are not in the room, but they are here.

Mr. RICHARDS.—They are over at my room at the hotel. When Mr. Richards comes back I will have him get them.

WITNESS.—I would like to say that the testimony brought out on cross-examination yesterday would indicate that Mr. King and Mr. Richards had worked together about those bonds, because I knew nothing about that; and I would like to see whether the idea was to sell bonds that was worthless.

Mr. CLARK.—Q. Well, you considered this property worthless, did you?

A. No, sir, I didn't; but I didn't consider that it was a proper thing to dispose of any bonds unless we absolutely had the money to pay the interest; and that was so stated to Mr. King.

Q. You were up at the mine on how many occasions when you were in Salmon City?

A. On three occasions; once in the mine, once outside, and once within about 50 feet of it.

Q. Was Mr. King with you at any of those times?

A. Mr. King met us at the mine on the Sunday afternoon; but we simply had social intercourse, and I don't remember that he went in the mine with us at any time.

Q. The other two times he was not there at all?

A. Well, I don't—I won't swear to it. I have tried to refresh my mind, but to the best of my

(Testimony of Arthur H. Lamborn.)

knowledge and belief he was not there; but still there is an indefinable feeling that he was there on the last morning—I think on Wednesday morning —but I am not sure of it.

Q. Well, that is rather a contradiction of terms, Mr. Lamborn, to say to the best of your knowledge and belief he was not there—

A. Well, I say to the best of my knowledge and belief, but I say there is an indefinable feeling that he was; but in other words, the preponderance of feeling is that he was not there.

Q. How do you explain that indefinable feeling, Mr. Lamborn?

A. Well, I was with Mr. King considerable of the time, and I was with his daughter considerable of the time. I know she was up at the ranch with us, and I was with Mr. King on all of Tuesday, when we went on the picnic; that is, I was with him most of the day; and the matter of the mine was under continual discussion.

Q. You understood that Mr. King had paid $30,000.00 for this property?

A. He stated he had.

Q. And you also understood that he had placed quite a lot of improvements upon this property after purchasing it?

A. He said he had spent about $2,000.00 in improving it.

Q. So his permanent outlay in the property was approximately $32,000.00?

(Testimony of Arthur H. Lamborn.)

A. By his statements, that amount would be indicated.

Q. Now, you stated in your testimony yesterday that you did not expect this property to pay dividends the first year?

A. No dividends. I expected it to pay interest. You must remember that we have two propositions —an interest proposition, and a dividend proposition.

Q. Well, you expected it to pay interest on $80,000.00?

A. I did, and have a surplus of $3,000.00 for working capital.

Q. Well, then, if it did pay six per cent on $80,000.00, that would of course make the bonds to that amount salable bonds on the market?

A. Well, if the dividend was earned from the property, of course it would.

Q. Well, if it paid interest on the six per cent bond issue, why that would make the $80,000.00 bond issue a profitable proposition?

A. If it paid interest out of the operation—but not if it paid interest.

Q. Well, the coal mine alone? Now, that ranch property was very valuable property, wasn't it?

A. Well, Mr. King said we would make $1,000.00 a year, renting it on shares.

Q. That ranch property was a very valuable piece of property, if sold upon the market?

A. Well, I don't know anything about the value of ranch property. Mr. King said the properties

(Testimony of Arthur H. Lamborn.)

around Salmon ran from $30.00 to $50.00 an acre. He said if the railroad came through there they advance materially. But even if it was worth $30.00 to $50.00 an acre, we were speaking of the thing from an investment standpoint.

Q. But if it was worth say $50.00 an acre, that would be $24,000.00 that the ranch property alone would be worth?

A. Yes, if it was worth $50.00 an acre. I don't know whether it was worth it or not.

Q. No—well, we will probably introduce some proof on it. Now, in this deal that you had formed there, you say you took his representation—Mr. King's representation—that this investment would pay you six per cent interest on $80,000.00?

A. I took his representation that it was earning six per cent on $100,000.00.

Q. Six per cent on $100,000.00?

A. Yes, sir.

Q. And you wouldn't have taken this proposition if he hadn't so stated?

A. I certainly would not have taken this property unless he could have stated that it earned interest on the bonds isued.

Q. On the bonds issued? A. Yes, sir.

Q. Then of these bonds issued you were to obtain—Mr. Richards and you between you were to obtain $65,000.00 of them?

A. That I didn't know at the time.

Q. Well, you knew that you were going to obtain— A. —$30,000.00.

(Testimony of Arthur H. Lamborn.)

Q. —$32,500.00?

A. Well, so it appears in the contract—$32,500.00—but in reality all I expected, and all I do expect until Mr. King explains the thing, is $30,000.00.

Q. You understood that you were to have bonds to cover all the payments that you made?

A. Yes, sir.

Q. Then you expected to have bonds to cover all the payments you made; and it now seems that you were also to obtain two-thirds of the $32,500.00 bonds that were coming from Mr. Richards?

A. Not of the $32,500.00—you continually say that—$22,500.00, I think the testimony shows.

Q. Well, $22,500.00? A. Yes, sir.

Q. And you were to obtain two-thirds of the $22,500.00 of those bonds?

A. I was to obtain my proportion of any profit that Mr. Richards made from the sale of the property.

Q. So you would have approximately $45,000.00 of the bonds of that company, on an investment of $30,000.00; and you also required Mr. King's guarantee that those bonds would pay the six per cent, and in addition to that that the property would pay a six per cent interest on $100,000?

A. Now, you are absolutely mistaken. I never required Mr. King's personal guarantee of anything, except his statement that the property was earning—I did expect his statement to be borne out that the property was earning six per cent.

Q. And you would not have put in this $30,000.00,

(Testimony of Arthur H. Lamborn.)

even if you had only understood that it would pay six per cent interest on $80,000.00?

A. Oh, yes, if the property had earned it; but not on Mr. King's payment of the interest—certainly not. If we had offered the bonds for sale to investors, and Mr. King's guarantee only had been back of it, it would not have been a proper investment; it would be what you call eastern high finance.

Q. Why wouldn't it have been a proper investment?

A. Because it wouldn't. The property would have to earn the investment, and not some officer of the company guarantee the investment.

Q. Well, you were willing to go out and take the property on his statement that it would do that; and still you say the bond-buyer would not take it on his statement?

A. Well, you asked me if I am a business man; but I am not hunting or examining investments like a bond-house would be. I am a salesman, selling sugar throughout the country.

Q. Well, do you mean to say in this record that you are not a business man?

A. Well, I am so considered in my line of business.

Q. Well, you understand business transactions pretty well. You rub up against a great many pretty shrewd men who are always ready to take advantage of you?

A. I don't rub up against smooth men; I rub up against reputable men.

(Testimony of Arthur H. Lamborn.)

Q. Do you mean to say, Mr. Lamborn, that the associates you have are men with whom you deal with the entirest confidence in their word?

A. Absolutely—every sugar refiner I deal with.

Q. And all the business men you have run up against as sugar broker in New York are men whom you would go out and buy property upon their personal representations?

A. Yes, to me, because they happen to be my personal associations.

Q. And that is the general reputation of the New York business man, is it?

A. I say it is the reputation I give the sugar people that I come in contact with.

Q. And on account of the extreme confidence which you have placed in your business associates, and those with whom you have done business for these many years as a sugar broker, you feel that you could take the word of any reputable man when he would try to sell you a piece of property?

A. No, I wouldn't say any reputable man who may be a stranger to me, but any man who might be introduced to me and whom I found in the position of Mr. King, yes.

Q. And for that reason you feel somewhat in the position of an innocent man who was imposed upon?

A. No—I feel more like a fool, I'll tell you.

Q. You feel more like a fool?

A. I feel very much chagrined at my own lack of judgment.

Q. And you think that you did this business in

(Testimony of Arthur H. Lamborn.)

the way that you ordinarily do business?

A. Well, I will answer that question this way, because it requires a broader answer. In the sugar business in New York City, with the men I am doing business with we do business on a very large scale, and I use the telephone largely. Last Wednesday we sold in New York over 100,000 barrels of sugar; it was sold in less than four hours. Now, it had to be done with great rapidity, and with mutual confidence. There are many contracts; they are not endorsed by either party; I, as broker, sign them with my name; and I have never known them to be definitely repudiated by buyer or seller, whether the market advanced or declined, and I have been doing business on that basis since 1892. It was a lax business way, and I am perfectly willing to say that I was lax in this; but it was a question of absolute confidence on the part of Mr. Richards and Mr. King.

Q. Did you ever buy any mines before?

A. Yes, sir; I bought an interest in a mine, and I have no holler, and I have lost my money, so far as I see; but not the slightest kick has come from me.

Q. At that time you investigated the mine, didn't you? A. Yes—very largely, too.

Q. And you depended upon the investigation which you made?

A. Well, I was enthusiastic in that particular case.

Q. Well, you were somewhat enthusiastic in this case, weren't you?

A. Well, I was led to be enthusiastic by Mr. King

(Testimony of Arthur H. Lamborn.)
and Mr. Richards on this proposition, yes—not enthusiastic, exactly; but perfectly satisfied that their statements were correct.

Q. Well, what made you satisfied that their statements were correct?

A. Well, Mr. King, I have already stated, was the leading banker of the town.

Q. You had never seen him before?

A. No, I had never seen him before; but I saw him there; I saw his position.

Q. And you don't know now that every statement he made was not correct, except what Mr. Richards tells you?

A. I am satisfied that the statements are correct. We have his stubs; we have them here; and we have his letter showing that in the previous 65 or 70 days he had only produced about 650 tons.

Q. You heard Mr. Richards state that that mine could have produced 2,300 tons and more, if they had attempted to produce it?

A. I beg your pardon—"if they had attempted to produce it"—but they would have been foolish to attempt to produce it unless they had had the demand.

Q. Well, did you hear that statement?

A. I didn't hear that statement, because I don't think he answered it that way. If you read the testimony I am willing to admit it if it is there; but I think the evidence that came on that point and the final answer—

Q. What do you think he said?

A. I think he said the mine could have produced

(Testimony of Arthur H. Lamborn.)

2300 tons, if the orders and the demand had been there.

Mr. CLARK.—Now, then, Mr. Hamer, will you read Mr. Lamborn the question I asked him?

The Special Examiner thereupon repeated said question, as follows: "Q. You heard Mr. Richards state that that mine could have produced 2,300 tons and more, if they had attempted to produce it?"

Mr. CLARK.—Q. Now, do you see any material difference in the question?

A. Yes; if they had attempted to produce it is very different from if they had had the orders. They would not have attempted it unless they had had the orders.

Q. Well, if they had attempted to produce it—that is what Mr. Richards stated, wasn't it?

(No answer.)

Q. Why, Mr. Lamborn, do you continually disregard my questions, and assume to answer them some other way?

A. I am not assuming to disregard your questions; but my memory on the testimony yesterday should be as good as yours, and I don't think Mr. Richards testified in the way you put the question. I don't hesitate to state that I believe, also, that the mine could have produced 2,300 tons, or more if the orders had been there to be filled.

Q. Yes; and that was the information you got from Mr. Richards?

A. Why, we had the information from Mr. King and Mr. Richards and Mr. Miller that the mine could

(Testimony of Arthur H. Lamborn.)

be opened up to produce more than 2,300 tons per annum, yes, and I asked them all that question.

Q. And you still believe that that is true?

A. I don't believe that anything that Mr. King has said to me would be necessarily true.

Q. Well, now, just answer my question, Mr. Lamborn. You still believe that that is true?

A. I believe it, if Mr. Richards and Mr. Miller—

Q. Is it necessary for you to say that you believe that from Mr. Richards and Mr. Miller in order to answer my question?

A. Well, what other basis have I for believing it?

Q. Well, I am not asking you for your basis of belief, but I asked you if you still believe that to be true? Now, you can answer that yes or no.

A. Do I have to answer that yes or no?

Mr. RICHARDS.—You can always make an explanation; if not now you can on redirect.

WITNESS.—I have no way of knowing unless I would have the testimony of either Mr. Richards or someone that I had confidence in, to state that the mine could produce that amount. That is, I would believe them, yes.

Mr. CLARK.—Q. Well, do you believe it in this instance?

A. I want to believe it, yes, and I did believe it in the first place.

Q. I am not trying to fence with you on this thing, Mr. Lamborn. Did you hear Mr. Richards testify that the mine could have produced, and would have produced if they had had the orders to fill, 2,300

(Testimony of Arthur H. Lamborn.)

tons and more? Did you hear Mr. Richards testify to that? A. Yes, in substance; yes.

Q. Did you believe it when he testified to it?

A. Yes.

Q. And do you now believe it?

A. Yes. I don't want you to feel that I am trying to evade your questions. The thing is beyond my knowledge. I believe it, yes.

Q. There never has been a time since that statement was made to you that you did not believe that the mine could have produced 2,300 tons, and more, if they had had the orders to fill?

A. No, sir.

Q. How?

A. No, sir—I believe it could have produced it.

Q. Then, so far as the—

A. I thought you were speaking of my knowledge that the mine could produce it.

Q. No.

A. It is my belief, yes; but I don't know. I am not technically acquainted with mines.

Q. Then the only place where you consider yourself damaged in this statement which you say Mr. King made, that you have reason to believe was not true, was the fact that he stated the mine did produce this, and that he had sold it to the people around Salmon?

A. No, that is not the whole basis, of course not. He said it had been mined and sold and delivered in and around Salmon—2,300 tons—and outside of Salmon 300; and that the expense of mining and pro-

(Testimony of Arthur H. Lamborn.)
ducing and delivering that coal was $3.00 per ton.

Q. Now, let me ask you this question: If this mine had produced 2,300 tons, or more, while Mr. Richards was the general manager of it, and there had been sufficient demand in and around Salmon to cause all of that coal to be disposed of; but you should afterwards have found out that when Mr. Richards stated to you that the year before he had mined and sold—

A. Mr. Richards stated, you mean?

Q. No—I mean Mr. King stated that he had mined and sold 2,300 tons; would you still have considered yourself injured by that statement?

A. In other words, if we had produced 2,300 tons during the year following the signing of our original contract?

Q. Yes.

A. Would I have been injured? Would I have felt myself injured if we had not produced any more than had been produced in the 11 months previous?

Q. No. If you should have found out that Mr. King's statement was false, after you took charge of it; but you were able to sell the 2,300 tons, or more; you would not have cared if Mr. King had overestimated the amount that they had produced the year before, would you?

A. Why, the way the question sounds to me is that—well, it is very ambiguous; I wish you would have the stenographer read it.

Mr. CLARK.—Yes, I would be very glad if you

(Testimony of Arthur H. Lamborn.)

would. It is a little long; but I don't think it is ambiguous.

WITNESS.—Read that original question.

The Special Examiner thereupon repeated said question, as follows:

"Q. Now, let me ask you this question: If this mine had produced 2,300 tons, or more, while Mr. Richards was the general manager of it, and there had been sufficient demand in and around Salmon to cause all of that coal to be disposed of; but you should afterwards have found out that when Mr. Richards stated to you that the year before he had mined and sold—

"A. Mr. Richards stated, you mean?

"Q. No—I mean Mr. King stated that he had mined and sold 2,300 tons; would you still have considered yourself injured by that statement?"

Mr. CLARK.—Q. —made by Mr. King?

A. In other words, you mean if Mr. King had only produced say 1,000 tons, and we had produced 2,300 tons or more, during Mr. Richards' management of the property?

Q. Yes.

A. In one year?

Q. Yes.

A. Would I have considered myself injured? Yes, sir, certainly, decidedly; because I would have been associated with a man who had misrepresented things to me, because then he stated that the coal could be mined for $3.00 a ton.

Q. And you would have considered yourself in-

(Testimony of Arthur H. Lamborn.)
jured? A. Yes, sir.

Q. And you would still have refused to go through with this deal?

A. I am satisfied that I would.

Q. Yes; although you would have had a half interest in this mine, and this man in whom you had the greatest confidence (Mr. Richards) had a quarter interest, and between you you had a three-quarters interest, and $65,000.00 bonds, upon which you were receiving six per cent interest; you would still have refused to go through with the deal?

A. Certainly I would. And is your mannerism in saying "Yes," is it intended to mean that you doubt my veracity; or what is it for?

Q. Well, if you are asking me for an apology it is entirely out of place. I will say, however, that I have no reason to doubt your word. I never met you until yesterday, and you have always treated me like a gentleman, and I couldn't doubt your word.

A. Well, it may not be sneering; but does your word "Yes" come in after my answer?

Q. Well, I must decline to answer that. If we have any personal difficulties to settle we must settle those outside of the courtroom. I will state to you, however, that I don't care to treat you other than as a gentleman, Mr. Lamborn. If I have an unfortunate way of questioning, why I am sorry for that. I will say, however, if you want an explanation, that there are a good many of these matters that seem very peculiar to me. However, I am not the Judge of this case. Did you understand the method in

(Testimony of Arthur H. Lamborn.)

which this mine was being worked during the time Mr. Richards had the management of it?

A. Yes, sir.

Q. And you understood that he was not working this mine with the idea in view of taking from it all the tonnage that he could; but for the purpose of permanently improving it?

A. I understood that he was mining the main entry to a point which they had agreed upon with Mr. King and Mr. Miller, and what distance that was in I can't recollect; it was something like 400 feet; and that they expected to reach there about the middle of November, when they would go up on a breast—on an incline—to take out coal from a room.

Q. Did you have some letters from Mr. Miller, who was the manager of the mine during the time that—I mean superintendent of the mine during the time that Mr. Richards was manager?

A. Well, I had, I think, either one or two letters from him. I don't know whether I have them or not. I have an idea there is one of them in my file.

Q. Did you write to him direct, to ascertain something about the condition of the mine?

A. Not with the idea of casting any reflections on either Mr. King or Mr. Richards, but simply with the idea of keeping in touch with him. I stated to Mr. Miller when I left there that I would like to hear from him, and at any time, and that I would write to him if he wrote to me.

Q. And he did write to you, and you wrote to him?

(Testimony of Arthur H. Lamborn.)

A. I am sure that I answered any letters that I received.

Q. Well, you have a recollection of having written him?

A. I have more of a recollection of hearing from him; and if I heard from him I undoubtedly answered it.

Q. And he wrote you something about the conditions that they found there?

A. Well, the thing wasn't of any importance, except that I would have liked to have kept in touch with Mr. Miller. He impressed me as a good man, and a man that we wanted to have with us.

Q. Do you recollect when it was that you received these letters from Mr. Miller?

A. Well, I don't recollect definitely, but I think it was in November or December of 1908.

Q. You were receiving letters from Mr. Richards right along?

A. Yes, both Mr. Richards and Mr. King. But that was in the general line of correspondence, while with Mr. Miller I think it was more with the idea of keeping in touch with him; that Mr. King and Mr. Richards and all of us felt that we had a man there that we wanted to make him feel good over his position with us.

Q. Now, you understood that Mr. Richards was managing the mine there?

A. Well, I didn't understand that he was managing it in the sense that he was directing the operations nearly as much as Mr. Miller was. Mr. Miller

(Testimony of Arthur H. Lamborn.)

was the superintendent of the mine; and the idea was that Mr. Richards was to be general manager—was to have that title—that he was to manage when he was there, and when he wasn't there to give him prominence in the town, and to help fill orders, we gave him the position of general manager. But I don't think it had anything like the significance, as far as the operation of the mine was concerned, as Mr. Miller's title of superintendent. But of course I am not qualified to pass on that, because I don't know what instructions Mr. Richards gave to Mr. Miller. The impression was that Mr. Miller was in charge of the operations.

(At the request of Mr. Clark the Special Examiner marked a certain document for identification as Defendants' Exhibit 11, on cross-examination.)

Q. I show you, Mr. Lamborn, what purports to be a copy of a letter written by you to Mr. John G. Richards, and I will ask you if you wrote that letter to Mr. Richards?

Mr. RICHARDS.—Just a moment. We object, because there has been no notice or request to produce the original.

WITNESS.—Why, there is no question about it—I wrote the letter; but I am surprised that you would offer it in testimony.

Mr. CLARK.—Well, now, I want to say another thing, Mr. Lamborn, right now: That neither as a lawyer nor personally do I intend to have any more of such slurs as that cast at me. The question of

(Testimony of Arthur H. Lamborn.)
what I offer in evidence is a matter for me to determine.

WITNESS.—Well, I will withdraw my remark.

Mr. CLARK.—I will offer the letter when I get somebody on the stand whom it can properly be identified by.

(At the request of Mr. Clark, the Special Examiner thereupon marked a certain letter for identification, as Defendants' Exhibit 12, on cross-examination.)

Mr. CLARK.—Q. I will show you Defendants' Exhibit 12, and ask you what that is?

A. It is a letter addressed to Mr. H. G. King, Salmon, Idaho, "Dear Mr. King," and signed by A. H. Lamborn.

Q. That letter was written by you and—

A. Dictated by me and signed by me.

Q. And sent to Mr. King at Salmon City, was it?

A. Yes, sir.

Mr. CLARK.—We offer this letter in evidence.

(At the request of Mr. Clark the Special Examiner thereupon marked a certain letter for identification, as Defendants' Exhibit 13, on cross-examination.)

Mr. CLARK.—Q. I show you paper marked Exhibit 13, on cross-examination, and ask you what that is?

A. It is a letter addressed to Mr. H. G. King, Salmon, Idaho, "Dear Mr. King," signed by A. H. Lamborn.

Mr. CLARK.—We offer that, also.

(Testimony of Arthur H. Lamborn.)

Mr. RICHARDS.—No objection to Exhibit No. 12.

(At the request of Mr. Clark the Special Examiner thereupon marked a certain letter for identification, as Defendants' Exhibit 14, on cross-examination.)

Mr. CLARK.—Q. I show you a paper marked Defendants' Exhibit 14, on cross-examination.

A. This is addressed to Mr. H. G. King, Salmon, Idaho, "Dear Mr. King," signed A. H. Lamborn. The reason I look at the signatures, I have got a clerk whose signature is exactly like mine, and most of my letters are not re-read; they are signed by him. But those three that I have identified were signed by me.

Mr. RICHARDS.—No objection to Exhibits 13 and 14.

Mr. CLARK.—Q. How long were you in Salmon, Mr. Lamborn?

A. In the city—well, within the limits of the town, I should say, with the exception of the day on the picnic, four days—Sunday noon to Wednesday evening.

Q. Do you have a distinct recollection of the number of days that you were there?

A. Yes. I think I am quite safe in saying it was Wednesday evening we left there, and we arrived there, I know, on Sunday afternoon, about noon time.

Q. How?

A. We left on the day we signed the contract—the original contract—in the afternoon, immediately after signing it.

Q. And you came there on Sunday, and you left

on the 30th day of July? A. Yes, sir.

Mr. CLARK.—Well, I guess we can figure that up, if we can find an old calendar.

Redirect Examination.

(By Mr. RICHARDS.)

Q. Mr. Lamborn, you were interrogated by counsel on cross-examination in reference to your willingness to depend upon Mr. Richards in reference to the purchase of this property. I wish you would state in what respects you were willing to depend upon Mr. Richards in that regard?

A. Well, I depended upon Mr. Richards to the extent that I had confidence in him as a man, but without knowledge of coal, for I asked him specifically when he first came to me in New York City, on the second day he was in New York, what he knew of a coal proposition, and he said he knew absolutely nothing. I asked him if he had examined any coal properties; he said he had not. I believed his judgment of Mr. King was good, because when I was in Mexico he on very many occasions spoke of Salmon, Idaho; the beautiful location; the character of the country; the society that was in there; the fact that it was an inland town, and with modern improvements; and he also mentioned the Shoups, and other people whose names I have forgotten; but undoubtedly among them was Mr. King, for the reason that he spoke of the best people of the town, and they were the people whom I found Mr. Richards knew. The way I remember the Shoups is the fact that he was Senator.

(Testimony of Arthur H. Lamborn.)

Q. Well, it will not be necessary to go into that. Now, you state that you were dissatisfied with the arrangement with Mr. King—became so about January 20th or 25th, I think, in 1909. What was the reason for your dissatisfaction?

A. His statements had not been proven. He had not mined, according to the reports I had from Mr. Richards, in the previous 11 months from the time we had made the contract, anything to compare with the amount of coal which he had stated he had mined.

Q. Then you found that the basis upon which you had invested your money was different from what Mr. King had represented it to be?

A. Entirely different.

Q. And what did you find about that time in reference to the total tonnage produced during the time that Mr. King had made the statement to you, as compared with what he said it had produced?

Mr. CLARK.—That is objected to as incompetent and immaterial, for the reason that this witness is not competent to answer such a question.

WITNESS.—Will you repeat the question, please?

Mr. RICHARDS.—Q. Counsel interrogated you relative to the reasons of your dissatisfaction. You stated that you found that they had produced 650 instead of—

A. — 2,300 tons for the town of Salmon, and 300 for outside points.

Q. That was one of the reasons of your dissatisfaction? A. That was the principal reason.

(Testimony of Arthur H. Lamborn.)

Q. What had you discovered relative to the cost of production, as compared with Mr. King's statement to you?

A. I had discovered nothing in regard to the cost of production at that time.

Q. Did you discover anything relative to the breast you could not see?

A. Mr. Richards wrote me about the same time—within one or two days of the time he gave me the information of the amount of coal mined, that the breast—

Mr. CLARK.—I object to the contents of that letter, unless the letter itself is produced.

Mr. RICHARDS.—Q. Well, you gathered the information from Mr. Richards?

A. From Mr. Richards.

Q. And that was one of the reasons for your dissatisfaction? A. It was.

Q. Now, you were interrogated by Mr. Clark also in reference to your efforts to dispose of these bonds, and certain exhibits have been introduced in relation to them. Have you any further explanation that you wish to make in reference to that?

A. I have made no effort to dispose of the bonds, because I realized the bonds would not be salable until we had produced enough coal to satisfy investors that the property was on a working basis. I think I wrote Mr. King that it should produce two and a half times the amount of the interest on the bonds. If I didn't write King to that effect I certainly wrote Richards to that effect.

(Testimony of Arthur H. Lamborn.)

Q. Counsel interrogated you relative to your knowledge of Mr. Richards, or Richards and King, attempting to dispose of these bonds, and in the exhibit, Defendants' Exhibit 13, this language appears: "As I understand it you are going to take up with Dick the question of making the bond issue not less than *$200,00,* or even $250,000, and issue at the present time $80,000 to cover the cost of the property." What had this reference to?

A. Well, the $80,000.00 to King and Richards and myself was to cover what we considered the value and the cost of the property at the time the contract was made. The $120,000.00 or more bonds that we proposed to issue was to take care of any betterments—developments—that either the town of Salmon might require, or that a railroad coming in there might necessitate our making such developments as to bring out a larger quantity of coal.

Q. Then in Exhibit 12—Defendants' Exhibit—you wrote in reference to certain gentlemen living at Colorado Springs—McKinnie—and in this you speak of the disposition of certain bonds.

A. Mr. McKinnie is the head of several sugar companies, the products of which the Meinrath Brokerage Company handle. Mr. McKinnie was a friend of mine. I knew he was in the coal business, and simply with the idea of finding out what information I could for the benefit of King and myself and Richards I took up the matter with him, and wrote to King, and also wrote to Richards and asked Richards to call on him.

(Testimony of Arthur H. Lamborn.)

Q. In this exhibit I find this language: "Mr. McKinnie's ideas regarding our selling $80,000 bonds to cover the cost of the property is that we would have to sell it more or less like any piece of real estate." To what had that reference?

A. Well, that would have to be— Will you let me see the whole letter, so that I can get the sense of it?

Q. Oh, certainly—you read it, I supposed.

A. I didn't read it all. (Witness read said letter.) Well, that that would have to be a gilt-edged investment; and I think that one of my subsequent or previous letters showed that the interest earned should be two and a half times the interest on the bonds.

Q. Well, has this reference to the effort of Mr. King, or Mr. Richards, or either of them, selling?

A. Absolutely not. I never have attempted to sell a bond to a living soul. Mr. McKinnie is a very wealthy man, a mine operator, and a man whom we had business with indirectly, and whom we have the entire confidence of, and a man that I got as much information from as possible.

Q. Well, had this reference to their selling bonds, of to gain information as a basis for your future operations; which had it?

A. Why, it had no reference to our then attempt to sell bonds; certainly not.

Q. That is what I wanted to get at. What information had you that Mr. King had invested $32,000.00 in that property?

(Testimony of Arthur H. Lamborn.)

A. His own word.

Q. Any other?

A. No other. Well, Richards stated to me in New York that King had told him he had paid $30,000.00 for the property.

Q. Well, it all came through—

A. King told me also in Salmon. I asked him how much it had cost, and he said $30,000.00.

Q. Counsel also interrogated you on the question if this property had paid six per cent, after you had entered into your contract, upon the $80,000.00, why you would have been dissatisfied with your arrangement with Mr. King. How about that?

A. I don't quite understand that.

The Special Examiner thereupon repeated the last question.

A. If it had paid six per cent and put away $3,000.00 to surplus, on the basis of 2,600 tons, I would not have been dissatisfied, unless I had found that Mr. King's representations had been false; and if they had been, if I had found them false, I would have been dissatisfied.

Q. But you invested your money on the basis of his statements? A. I did.

Q. And because you found them not true you were dissatisfied?

A. That is the only reason.

Q. Did you communicate to Mr. King information relative to your correspondence with Mr. Miller?

A. Well, I don't remember whether I told him.

(Testimony of Arthur H. Lamborn.)

I sent him copies of letters to Richards, and I sent Richards copies of letters to King, and I think I sent copies of the Miller letter either to Richards or King. In any event, I expect they saw them. There was no secret correspondence with Mr. King —or with Mr. Miller—or with any of them.

Recross-examination.

(By Mr. CLARK.)

Q. You suggested the possibility of making a $200,000.00 or $250,000.00 bond issue?

A. I believe I did, yes.

Q. That was an idea that occurred to you after the entering into of this original contract?

A. No, it was not; we discussed it at Salmon, Idaho, but we went into it more in detail after I left there. The first idea was to issue $100,000.00 bonds, and to keep $20,000.00 in the treasury, the $20,000.00 to take care of any improvements that came from the City of Salmon, if the business there warranted it.

Q. You say that what caused you to become dissatisfied with this contract was that you found Mr. King's representations to be false?

A. Yes, sir.

Q. How did you find that out?

A. I found it out from the fact that the mine had not produced 2,300 tons and sold it in the city of Salmon, and had not produced and sold 300 tons outside of the city of Salmon.

Q. Well, do you know that of your own personal knowledge?

(Testimony of Arthur H. Lamborn.)

A. I know it through Mr. Richards.

Q. From what Mr. Richards told you?

A. Yes, sir.

Q. Then you assumed that what Mr. Richards stated to you was true, and that if what Mr. Richards stated to you was true, what Mr. King stated to you could not have been true?

A. The way Mr. Richards gave me the information led me to believe that Mr. King had falsified, yes.

Q. And it would not have made any difference to you as to whether or not this mine paid six per cent interest on $80,000.00; still, if you had found out that Mr. King misrepresented the amount of tonnage that had been produced before during the previous year, you would still have been dissatisfied, and would have refused to have gone ahead with your contract? A. I would.

Q. And that would have been true also if it had paid six per cent interest on $100,000.00?

A. Yes, sir, if the question of tonnage and the question of the cost of production had been misrepresented.

Q. If he had misrepresented what had happened in the past, although those things that he said would happen in the future—all come true—still you would have been dissatisfied, and would have refused to have gone ahead?

A. As I understand the question, what you mean is: You mean if to-day the mine was on a profitable basis—if a year from now it was on a profitable

(Testimony of Arthur H. Lamborn.)

basis, and I, a year from now or to-day, found that Mr. King's representations had been false, I say yes, I would not have gone ahead with the contract.

Q. In other words, if you had found out that everything that Mr. King said would come true did come true—(that is not very good English, but perhaps you can understand it)—that it had developed that everything that Mr. King said would come true did come true,—

A. Would come true—did come true?

Q. Yes; but that something that he had said had occurred in the past was false; still you would have refused to have gone ahead with the contract?

A. I made my investment on the basis of his statements. Now, if I found to-day, and had not found out previously, that he had falsified; and then if to-day the mine was producing on the basis he claimed it had produced; I would not have gone on with this contract.

Q. In other words, the very minute that you found out that he had made any misstatement of a past transaction, you would have immediately thrown up the deal?

A. I not only would have but I did throw it up, and wired immediately.

Mr. RICHARDS.—Q. You have reference, as I understand it, to the statements he made on which you based your investment? A. Exactly.

Q. And nothing else?

A. And nothing else.

Mr. CLARK.—Q. You understood that there

(Testimony of Arthur H. Lamborn.)

would likely be quite a largely increased demand as soon as the railroad got in there, didn't you?

A. That would be a natural inference, and we talked that over, too, but I think it was only as a possibility, and I think the correspondence—I don't know that the letters you produced here will show it—but I would like to say that the whole basis of our investment was on what had been done. While of course we had hopes of the future, the question of the original capitalization and bonding was on what they had in Salmon at that time.

Q. Did you make any estimate of the value of this ranch property?

A. I don't think we made any estimate of the value, because the ranch proposition—the only estimate we made of it was this: Mr. King said, "It will pay $1,000.00 per annum net to us," and he made a contract, or had made a contract, to work the property on shares, and his statement to me was that it would pay $1,000.00 per year, but the contract was not of long duration, and that would bring in something to us. I asked him what the value of land was out there, and he said at that time it was from $30.00 to $50.00 per acre, depending on the territory, but when the railroad came in there undoubtedly property would advance. I also asked other people in there what the prices of land was, and they told me from $20.00 to $50.00 per acre, but on account of the high cost of transportation it was hard to sell what the land produced, because they could not take their crops out.

(Testimony of Arthur H. Lamborn.)

Q. Of course, the prospect of a railroad coming in there was an inducement which was a very material one in making this investment?

A. It was not.

Q. It was not?

A. No, sir. Going in, coming out, and all the way going out there, I took it up with my railroad friends, and I couldn't get anything definite, and Mr. King was the only one that had anything of a definite nature. The people in there told me that they had waited forty years for a railroad, and we met Sharkey, at Sharkey's ranch, and talked with them, and they thought it was "hot air," and very few thought it would come through, because they had had the same dreams for many, many years.

Q. Well, didn't Mr. King tell you that he had definite information that it would come through?

A. He said he had information in regard to the right of way coming through there, yes; but he was not in a position to say at that time that the railroad would come through.

Q. You understood that he had almost the assurance that it would?

A. I understood that Mr. King believed that the railroad would *would* through there; that the railroad people had worked with his bank in regard to a right of way.

[Testimony of F. C. Miller, for Plaintiffs (Recalled).]

F. C. MILLER, a witness heretofore produced by the plaintiffs, and duly sworn, being recalled by the plaintiffs, testified as follows, to wit:

Direct Examination.

(By Mr. RICHARDS.)

Q. Mr. Miller, yesterday in the examination you stated that it cost under your arrangements and operations there $2.00 per ton to mine the coal, 75 cents to clean it, and 90 cents to haul it, but did not include the superintendent's expenses in that. About how many tons per annum were you figuring on at that time—the production—in estimating what it cost? A. Well,—

Q. Or put it per day?

A. About ten tons.

Q. About ten tons a day? A. Yes, sir.

Q. And about how many days did you work in the year, Sundays and all?

A. No—we work six days a week.

Q. Something over 300 days?

A. 300 days is what—

Q. Do you work the same way through the summer?

A. Well, the trade is not as good in the summer as what it is in the winter.

Q. Upon the basis you were estimating that cost, about how many tons would it be per annum?

A. Well, probably from 1,500 to 1,800 tons.

(Testimony of F. C. Miller.)

Q. And what is the salary of the superintendent? A. $150.00 a month.

Q. And that would have to be added to these items of cost which you have mentioned?

A. Yes, sir.

Q. So that would make it $4.65 a ton, the actual cost? A. Yes, sir.

Q. And there were other items; the expense of printing and all those smaller things you didn't take into consideration? A. No.

Q. Then, would the expense be in the neighborhood of $5.00 per ton, in your judgment?

A. Well, I guess it would come about close to it, as we have been mining.

Q. Now, what is the cost of selling? Have you taken that into consideration at all?

A. Why, no. We didn't have any trouble about selling.

Q. It is just a mere matter of delivery?

A. A mere matter of delivery, yes.

Q. Taking the size of the openings in the Pollard workings, about what, from the size of the openings and the quantity of coal that is taken out there, could be produced in tonnage in those openings?

A. Well, that would be rather hard to say.

Q. Well, Mr. Forrester in his testimony said not to exceed 3,000 tons. Is that substantially correct, in your judgment?

A. Well, that would be pretty close to it.

Q. Does that include up to about the time Mr. Lamborn became interested?

(Testimony of F. C. Miller.)

A. Well, I don't suppose it would have been possible to produce quite as much at that particular time.

Q. Well, I mean up to that particular time, you think Mr. Forrester's statement would be substantially correct? A. Yes, I think so.

Q. Did you see Mr. Forrester's maps of the breast?

A. Yes. His map of the mine is a copy from a map that I had.

Q. It is substantially correct, is it?

A. It is correct, yes, sir.

Q. Well, where he shows these breasts—for instance on Plaintiffs' Exhibit "B"—does that, as you recollect, substantially show the relative layers of the material in the breast?

A. Well, that would not be as it is in the breast of the places that Mr. Lamborn—

Q. No—I am speaking of the ones that Mr. Forrester shows here? A. Yes.

Q. Do you think those are substantially correct?

A. I think that would be about correct.

Q. That would be the same with exhibit "C," also, which I show you?

A. I think that would be correct.

Cross-examination.

(By Mr. CLARK.)

Q. What is the selling price of coal in Salmon now? A. $7.00.

Q. Is that what you are getting for coal?

A. Yes, sir.

(Testimony of F. C. Miller.)

Q. The coal that you are mining now?

A. Yes, sir.

Q. Now, do you say that the cost of mining this coal—the actual cost at the mine is what?

A. It is $2.00 a ton; that is for mining.

Q. Do you contract for that?

A. Yes—contract work.

Q. And how much does it cost you to sort?

A. About 75 cents. That would include the timber.

Q. That includes the timber? A. Yes, sir.

Q. And the delivery costs you how much?

A. 90 cents.

Q. 90 cents?

A. We have been paying 75, but we pay 90 this winter.

Q. Now, the only other additional expense is the superintendent's salary?

A. Yes, and the little printing, which perhaps does not amount to over $15.00 a year, at the most.

Q. How?

A. A little printing, which would not amount to over $15.00 a year, at the most.

Q. Do you get $150.00 a month the year round?

A. Yes, sir.

Q. Well, Mr. Miller, if the mine should produce 3,000 tons a year, of course, the cost would be materially decreased, wouldn't it? A. Yes.

Q. As to the cost of mining the coal, it depends a great deal upon the amount of the production?

A. Yes, it does.

(Testimony of F. C. Miller.)

Q. The conditions you have there are somewhat crude for handling coal at the present time?

A. Yes, sir.

Q. And handling the mine? A. They are.

Q. And, of course, the cost could be materially decreased by getting better conditions—more modern conditions? A. Yes.

Q. Under modern conditions, and based on an average yearly tonnage of 3,000 tons, what would you say would be the cost of mining that coal?

A. Well, I think that that coal could be mined for a dollar and a half where we are paying $2.00 now.

Q. And would there be any difference in the sorting?

A. Well, we materially could reduce the price of sorting, providing we could keep enough coal orders to keep them busy continuously. That could be done at 50 cents a ton, and possibly less.

Q. Then you could mine and sort it for $2.00 a ton, and your delivery price would probably be about the same?

A. Well, I think we could deliver that coal for less money if we have our own teams and work it properly—less than 75 cents—probably about 65 cents.

Q. And you think the mine could be run under modern conditions, on the basis of 3,000 tons a year, at an expense of $2.65 or $2.75, and deliver the coal?

A. Yes, I believe so. I believe it would not exceed $3.00, counting in incidentals.

(Testimony of F. C. Miller.)

Q. Then, the only thing that would be added to that would be the superintendent's salary?

A. Yes.

Q. And, of course, Mr. Miller, the increased production, if it was increased beyond 3,000 tons, it could still be mined a little cheaper, as long as the production was increased, couldn't it?

A. Yes, it could. It would facilitate the handling and so on, and it would reduce the expense of putting it into the bins, and taking it from the mine, etc.

Q. Now, when Mr. Richards was mining there, when he was the manager, were you mining under favorable or unfavorable conditions, so far as producing coal cheaply?

A. Well, I would consider them very unfavorable.

Q. Well, now, why do you say that?

A. Well, because we had nothing only the face of an entry to get our coal from, to begin with. The works in farther were more or less caved, and we couldn't get to the coal breast so that we could work out the coal.

Q. Then, the money that was taken in there at the mine during that time was used, a great deal of it, in development work, was it—what you might call development work?

A. Yes—to drive that entry.

Q. And to open up the mine? A. Yes.

Q. So that you could get at the bodies of the coal?

A. Yes, and it was also for prospecting as well,

(Testimony of F. C. Miller.)

because we were not thoroughly familiar with what might be ahead of us.

Q. Now Mr. Richards was manager there from sometime in August till along about the first of February?

A. Well, that is my understanding—perhaps longer—I don't know.

Q. Did this trouble that was being had between Mr. Lamborn and Mr. Richards and Mr. King in any way interfere with the operations of the mine up there?

A. Well, I didn't go ahead to make any improvements.

Q. And you simply let the matter drift along?

A. Yes.

Q. And didn't make any particular effort to increase the tonnage, or make any improvements?

A. Well, no, I didn't.

Q. And about the time Mr. Richards and Mr. Lamborn and Mr. King got into this trouble, that caused you to assume that attitude, was about the time when you had pursued your developments to the extent that you were able to mine more favorably, wasn't it? That is, you had just about uncovered the old breast, hadn't you?

A. Well, yes, we could have mined more favorably.

Q. And you had gotten it into such a condition that you could have materially increased the tonnage? A. Yes.

Q. Now, this old breast from which Mr. King had

(Testimony of F. C. Miller.)

been taking the coal had been covered by caves, etc., so that it could not be gotten at, at the time that Mr. Richards took charge of the mine?

A. No, we couldn't get at any of that coal.

Q. And during the time that Mr. Richards was managing the mine, you were pursuing your development work in order to uncover this old breast, and also other places in the mine? A. Yes.

Q. And it was just about the time that you had this uncovered, and the mine in a favorable condition to work, that this trouble came up, wasn't it?

A. Along about that time, yes.

Q. So you would not think that the coal produced there that year was any fair average of the production of that mine, would you?

A. No, I wouldn't consider it so.

Q. You would not consider it a fair basis to estimate the production of that mine upon, would you?

A. No, not under those conditions.

Q. Neither would you consider the expense incurred per ton in mining it and delivering it, to be a fair estimate of the expense, would you?

A. No. Of course, the delivery price was all right.

Q. But the mining and—

A. —and the rest of it—the interior mining.

Q. You don't know how much coal has been taken out of that mine in any one year, do you?

A. No, I don't.

Q. There may have been more than 1,800 tons taken out?

(Testimony of F. C. Miller.)

A. Well, I couldn't swear that there was or that there wasn't.

Q. You don't know? A. I don't know.

Q. You know that you are taking out, under the conditions that you are now working this mine on, an average of from 10 to 17 tons per day?

A. It has been running about that in the last month and a half.

Q. And isn't it true that as mines develop, of that character, that you mine in the summer time for the purpose of storing your coal and having an increased tonnage for the winter season?

A. That is usually done, yes, in coal mines.

Q. You never have done that in this mine before?

A. No, we haven't.

Q. There was some stored before you took this mine—or before these stubs introduced here in evidence—before you got your scales up that year—wasn't there?

A. Yes, there was some, as I understand it—as I remember it.

Redirect Examination.

(By Mr. RICHARDS.)

Q. In speaking about this increased production and the reduction of the cost, did you take into consideration the extension of these drifts as a part of that cost?

A. Well, the driving of entries is usually driven on contract—so much a yard.

Q. And that would be additional to the cost you have stated, would it?

(Testimony of F. C. Miller.)

A. Well, no, that wouldn't be additional, because the coal mined out of that would pay for the yardage, and just about offset the entry work.

Q. Well, the work that Mr. Richards did in extending those levels made it possible for you to increase the output since he left there, didn't it?

A. Yes.

Q. The prospecting and developing work is a part of the cost of production, isn't it?

A. Well, it might come under that head later on, as the mine is developed.

Q. And in order to increase this tonnage you would have to incur additional expense in the way of improvements, wouldn't you?

A. Yes, you would; the improvements had ought to be there.

Q. And that would be a part of the cost, also?

A. Yes, in the future production.

Q. Now, if you stored that coal what would it do, in reference to slacking or not?

A. Well, if the coal was put under cover there wouldn't be any trouble about that.

Q. You think, then, that it is a mere question of getting wet, whether it cracks or slacks or not?

A. No; it is the heat—the summer heat; that will slack it. That is, the sun, I should say, beating down upon it, that does it.

Q. How much had you stored?

A. Why, we never stored any, except what we had in the chutes outside.

Q. About five tons?

(Testimony of F. C. Miller.)

A. Yes—except I might qualify that by saying that previous to or about the time that I first took hold of the property, there was some put in storage at the schoolhouse, and some at Shoup's, and at the Sheenan Hotel, for winter use.

Q. How will the tonnage this year compare with former years? A. Why, it is larger.

Q. Largely due to the work while Richards was there in extending those levels?

A. Well, yes, that was quite a help.

Recross-examination.

(By Mr. CLARK.)

Q. That is, it is larger than any time since you have had charge of the mine? A. Yes.

Q. You don't know anything about it before that time? A. No.

Q. Now, as a matter of fact, this development work was done during the fall and winter of 1908 and 1909? A. Yes.

Q. And this is the first year that you have worked the mine since you have been there, under fairly favorable conditions? A. Yes, sir.

Q. Now, Judge Richards showed you here on page 24, Plaintiffs' Exhibit "B," I think. This purports to be a section of coal vein as exposed at face of main entry, King Mine, Salmon City, Lemhi County. Were you present when Mr. Forrester took those samples? A. Yes, sir, I was.

Q. Where did he take them from, and where did he work up to?

A. At the time Mr. Forrester was there this sand-

(Testimony of F. C. Miller.)
stone came in, and shale; this here carbonaceous shale that he has there cut down into it. Occasionally we have sandstone that comes in that way, and that there back of us is coal, in portions. Now, the face varies in the different zones of the mine; it is not all alike.

Q. Well, is that a fair representation of the vein as it now exists in the face of that particular tunnel?

A. Yes, that is a pretty fair representation as it was at that time.

Q. Well, as it now exists?

A. As it now exists? Well, it doesn't exist; it is mined out.

Q. That particular one is mined out?

A. Yes.

Q. So you are not working on that particular vein now? A. No.

Q. And was it mined out very shortly after this sample was taken? A. Yes.

Q. Then that particular vein was almost mined out when Mr. Forrester took those samples?

A. Right along in there—we started to mine shortly after he left.

Q. And did you mine much before it was mined out?

A. Why, nothing more than we drove that entry there. He took a piece out of the entry.

Q. He took it out of the entry? A. Yes.

Q. What do you mean by that? Was that the place where you were mining for coal?

A. Yes, we were mining there at the time.

(Testimony of F. C. Miller.)

Q. But were you not doing it more in the nature of development work than for the purpose of getting the coal that was there?

A. Yes. That was where we were driving the drift, as I understand it. Yes—the face of the main entry.

Q. That was where you were driving your drift to get at the main bodies of the coal?

A. Yes—or, rather, driving the entry—practically the same.

Q. Now, when Mr. Forrester was there all of these old workings to which you have referred were covered up, weren't they?

A. Yes; he couldn't get around to the face of those at all.

Q. He couldn't get around to the face of the old entry that has been spoken of here, any more than Mr. Richards could? A. No, he couldn't.

Q. Now, how long was Mr. Forrester in that mine? A. A half a day.

Q. Did he make any investigations except in the main entry?

A. Why, he went up into a right-hand room and took a cross-section there.

Q. Now, I show you—is this the cross section he took there, marked page 25, section of coal vein as exposed at face of Room No. 1?

A. Yes, that is the room.

Q. At that place where he took that cross-section are you doing any mining now?

A. Not right there exactly, but very near.

(Testimony of F. C. Miller.)

Q. And where you are mining near that, does the vein show up as it is shown there?

A. Why, where we are mining now it is better than it is right in there. You see, coming back the vein gets better. If you will notice here this cross-section, this first one, this shows much poorer than this one, and this one here shows better. Well, it does get some better as we retreat.

Q. And where you are mining now it is better than that? A. Yes, even better than this.

Q. And much better than the first one that you referred to? A. A great deal, yes.

Q. These cross-sections that he has taken here, as a matter of fact, Mr. Miller, are not in any way a fair representation of the amount of coal in that mine, are they?

A. No, I wouldn't consider so.

Q. Or the character of the veins? A. No.

Mr. RICHARDS.—Q. I understood you to say that you were running the drift shown by this cross-section of Mr. Forrester, to get at the main body. What do you mean by that? Wasn't that the main body?

A. Yes; we were working in the main body; that is the main body.

Q. That is the main body? A. Yes, sir.

Q. Well, wasn't it possible for Mr. Forrester, at the time he was there and made these measurements, to get in where it had caved, where Mr. Lamborn could not get in when he was there?

A. Why, he could have gotten into that place

(Testimony of F. C. Miller.)

that Mr. Lamborn would have liked to have gotten into, and which Mr. Richards got into afterwards; but he thought it would not be necessary; he had seen enough, and what he had would be sufficient, anyway.

Q. Then these exhibits show a fair representation of the breast, at the time and place where he took them?

A. Yes, at those points the representations are all right.

Q. Well, this breast which he shows here is only a few feet from the old breast that Mr. Lamborn couldn't see, isn't it?

A. It is about—well, I should say about 40 or 50.

Q. And substantially the same body of coal?

A. It is the same zone, yes.

Mr. CLARK.—Q. But, however, you stated, Mr. Miller, that those two cross-sections would not truly represent the value of that mine as a coal producer?

A. Well, no, they wouldn't, because that portion of the mine there wasn't—looked pretty bad at that time—pretty poor. The coal in the slope is much better, more defined, and a little cleaner; and then the coal above was even better, particularly in the place where we had rooms, when Mr. Richards was there.

Q. Aren't those about the two worst places and under the most unfavorable circumstances that Mr. Forrester could have gotten, to have taken his samples, to show the true condition of that mine?

A. Well, they certainly don't show the exact true condition; that is, the average condition.

(Testimony of F. C. Miller.)

Q. And wouldn't you think that they were taken under the most unfavorable circumstances?

A. Well, they really were at that time, I believe.

Q. In reaching these two particular faces you were not searching for coal, but were simply driving your drifts, weren't you?

A. Yes. Well, we were—

Q. That is, you were searching for coal, but you were not expecting to find it at those particular places, other than taking out the coal that you found there in driving your drifts?

A. Well, that's all we were doing. Yes, we were just taking what coal we were taking out of the drifts.

Q. And in taking what coal you were taking out of the drifts, your principal object was to do development work, to get at better bodies?

A. Yes, it was.

Q. Better bodies of coal? A. Yes.

Mr. RICHARDS.—Q. But these faces are substantially the vein as it appeared at that time and place? A. At that time, yes.

Mr. CLARK.—Q. Under the conditions as he took them? A. Yes, as he took them.

Mr. RICHARDS.—Q. Subsequent development has shown some change for the better?

A. Yes, it does show better.

Mr. CLARK.—Q. And further developments showed better than that, too, didn't they?

A. Yes. Yes, they really did, I will say.

Mr. RICHARDS.—Q. Where it has been worked

(Testimony of F. C. Miller.)

out? A. Yes.

Mr. RICHARDS.—I think that is our side of the testimony, Mr. Clark.

[Testimony of Harry G. King, for Defendants.]

HARRY G. KING, a witness produced on behalf of the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. CLARK.)

Q. Mr. King, you may state your name, residence and occupation?

A. H. G. King; age, 50; residence, Salmon, Idaho; occupation, President of the First National Bank of Salmon, Idaho.

Q. You are one of the respondents in this suit?

A. Yes, sir.

Q. And are you acquainted with Mr. Lamborn and Mr. Richards, the complainants? A. I am.

Q. When did you first become acquainted with Mr. Richards?

A. In the spring of 1906, I think.

Q. At that time he was residing in Salmon City?

A. Yes, in Salmon.

Q. And you became acquainted with him?

A. Yes, sir.

Q. You at that time were the owner of a 480-acre tract of land near the town of Salmon, upon which was located the coal mine?

A. Not in the spring—I bought it later, Mr. Clark.

Q. You bought it after you became acquainted

(Testimony of Harry G. King.)
with Mr. Richards? A. Yes, sir.

Q. Did you discuss this matter at all, or anything in regard to this mine, with Mr. Richards, before you purchased it? A. Not at all.

Q. When was it that you purchased this mining property, and also this 480-acre tract of land?

A. In the fall of 1906.

Q. Do you recollect the date?

A. I forget the exact date when the agreement was—

Q. And from whom did you purchase it?

A. Mr. Pollard.

Q. Did you purchase it after having made an investigation of the property? A. Yes.

Q. That was just such an observation as you made? A. It was a very—

Mr. RICHARDS.—I would suggest, Mr. Clark, in order to avoid objections, that you be just a little careful about leading.

Mr. CLARK.—Yes. All right.

Q. Did you have any knowledge of coal mines?

A. None whatever.

Q. And did you have any expert examine it?

A. None at all.

Q. Did you use anyone's judgment but your own in purchasing it?

Mr. RICHARDS.—Mr. Clark, I would suggest that you don't lead the witness.

Mr. CLARK.—Well, I don't think that is a leading question.

Mr. RICHARDS.—Well, then, I will have to in-

(Testimony of Harry G. King.)

terpose objections continuously.

Mr. CLARK.—Well, then, I guess I will have to ask you to object to that question.

Mr. RICHARDS.—All right.

Mr. CLARK.—Q. What, if any experience had you had as to coal mines, prior to the time you purchased this tract of land from Mr. Pollard?

A. None whatever. I had never seen a coal mine.

Q. Now, about the time you purchased it, or shortly after, did Mr. Richards go with you to this mine? A. He did.

Q. How did he happen to go with you to this mine?

A. Why, I think first of all that my first acquaintance with Mr. Richards pertaining to the coal mine, we talked it over in a casual way what I had bought of Mr. Pollard, and he wanted to go up and see it, or I took Mr. Richards up there, and we went over the coal mine, and he was very much surprised, in this respect; that he made the remark to me that "it just shows that a mining promotor should go and look at every proposition that is offered to him, because this was a practical demonstration that he had overlooked a proposition when he was asked to see this property."

Q. Did he say that he had been asked to see it?

A. Yes.

Q. And just state what he did say about that.

A. Well, he said that he had overlooked a point; that if he had known as much as he did after this in-

(Testimony of Harry G. King.)

vestigation that I never would have got a hold of the property.

Q. Was anything further said by Mr. Richards at that time? A. Not until after we got home.

Q. And after you got home did you have any further conversation?

A. I did; and he thought we had a wonderful property.

Q. And did he say anything else about it, and did you say anything to him about it?

A. Well, I don't think we said anything from that day until he was contemplating making a trip back to Denver or somewhere, and he suggested that he could handle it, and I said I would be glad to have him handle it, and he would go away and see what sort of a deal that he could make, and in the meantime he would write me.

Q. At that time had you talked over any terms of sale? A. Nothing definite.

Q. You had just simply talked generally?

A. Just outlined in a general way.

Q. What did you pay for this property?

A. $30,000.00.

Q. Now, when did you again hear from Mr. Richards in regard to the matter?

A. It was from somewhere in Colorado; he wrote me and sent me a synopsis of an agreement to sign, telling me to keep one myself and send the other one to him. It was understood, in point of fact the same agreement is put in evidence here, relating to the sale for $80,000.00, for which he was to receive $30,000.00,

(Testimony of Harry G. King.)

providing he made the sale on the basis of the whole interest.

Q. Now, when did you next hear from Mr. Richards in regard to that?

A. I had quite a little correspondence with him from Higgins. He kept me posted as to his movements, what his ideas were, and more particularly with regard to the coal property, from Washington—while he was in Washington. He said that—

Mr. RICHARDS.—Never mind what he said, Mr. King, in those letters.

Mr. CLARK.—No, nothing that was in the letters.

Q. He kept you posted from time to time as to his movements? A. From time to time, yes.

Q. And where did he finally wind up?

A. In New York.

Q. And while he was in New York you received some communications from him? A. Yes.

Q. Did you prior to that time have any knowledge of any party with whom Mr. Richards was dealing?

A. I did by his letter to me from Washington. He had a party there that would have taken the property, so he wrote me.

Mr. RICHARDS.—Never mind what he wrote.

Mr. CLARK.—Well, that was in the letter that was introduced.

Q. But you had no name of any party?

A. None whatever.

Q. Now, after he arrived in New York you had some further communications from him?

A. I did.

(Testimony of Harry G. King.)

Q. And finally did you understand that he was coming back to Idaho? A. Yes.

Q. Accompanied by some other person?

A. Well, that was rather at the latter part of the negotiations.

Q. Mr. Richards finally did come back to Salmon City, did he? A. He did.

Q. Was anyone with him when he came?

A. No.

Q. Now, when he got back there did you have some conversations with him about this matter?

A. I did.

Q. Now, I wish you would state those conversations, in substance?

A. Mr. Richards came and told me that he had interested Mr. Lamborn in New York, and that he thought that there wouldn't be any trouble in getting him to take a hold of the property. And in the meantime that old agreement was about to expire, and he wanted to know whether I would extend it thirty days, which I did, and it was my suggestion to Mr. Richards that he have Mr. Lamborn come and examine the property. I didn't know Mr. Lamborn in the transaction at all; I had left this entire matter in Mr. Richards' hands; he was promoting the property, and the only information that I gave him was what he permitted me to give in New York, principally by telegram. I extended the option the requested length of time that he wanted, in order to enable Mr. Lamborn time to get down there and look at the property for himself. We went over the terms

(Testimony of Harry G. King.)

a little more, and it is my distinct recollection—very plainly—that Mr. Richards told me at the time that he was negotiating with Mr. Lamborn for a half interest, and he had to represent to Mr. Lamborn that he was taking a one-quarter interest, and he wanted me to be very careful not to give that part of it away, but we could fix that up between ourselves.

Q. Did he discuss with you the reason why he sent the telegram asking you to telegraph an answer to a telegram that he had sent you in a particular way?

A. He did.

Q. What reasons did he give you for that?

A. Well, he was afraid that he would give his hand away to Mr. Lamborn, and he told me that at the time Mr. Lamborn dictated that long telegram and had it sent by his messenger out of the office that he hadn't an opportunity for some little time afterwards to get to the telegraph office and offset that telegram, so that he could dictate my answer to it. He also said that it seemed funny, that he was struggling to get away and trying to get an excuse to get away, but it was quite late at the time, and the consequence was his telegram I received, answering that long one, telling me how to answer it, did not arrive in Salmon until the next morning following, the day before the long telegram I got from Mr. Lamborn; otherwise I would have answered it. But that long telegram was rather ambiguous, and I hestitated a little while before I answered it; and in the meantime, the next morning, when I had made up my mind to answer it, I got a telegram from Mr. Rich-

(Testimony of Harry G. King.)
ards telling me how to answer it. He explained and told me what a time he had to get out of Mr. Lamborn's office in order that he could offset that telegram.

Q. Now, Mr. Richards was in Salmon City, after he returned, some days, was he? A. Yes.

Q. Before anyone else came?

A. Yes, he was. He was up to the mine a great deal, too.

Q. Did you go with him to the mine?

A. I did not.

Q. Did you pay any attention to his going and coming? A. Not at all.

Q. He had been around in Salmon for quite a long time? A. He was.

Q. Well, did Mr. Lamborn finally come to Salmon City? A. He did.

Q. When was that?

A. He arrived on Sunday evening—Sunday afternoon—I think it was Sunday afternoon.

Q. Well, now, had you ever been acquainted with Mr. Lamborn prior to that time? A. Not at all.

Q. Now, state what transpired after Mr. Lamborn came, in regard to this transaction?

A. Mr. Lamborn arrived there, I think, on Sunday, and Mr. Richards asked him up to the mine. I had no occasion to go myself, because I had made no particular effort at all to sell this property. It was all entirely in Mr. Richards' hands, and I felt that I was dealing with Mr. Richards, and not Mr. Lamborn.

(Testimony of Harry G. King.)

Mr. RICHARDS.—He is asking you what occurred, and not what you thought.

WITNESS.—Well, Mr. Lamborn and Mr. Richards on Sunday went up to the mine. Mrs. King and I, and I think a daughter of mine, we took a horseback ride that afternoon, and rode around the hills and came back down the canyon. As we came above the mine, coming down the canyon, Mr. Lamborn and Mr. Richards and Mr. Miller were just outside, by the blacksmith shop, and they just halloed to us as we were passing, and as a matter of courtesy I stopped and went up there and shook hands with them and had a little conversation, but did not go in the mine. Then we went on down, and after that I never went near the mine with Mr. Lamborn during all the time he was in Salmon City. Now, that was on Sunday. On Monday I didn't go up to the mine, but Mr. Richards and Mr. Lamborn went up to the mine for an investigation. On Tuesday it was arranged, as a little social matter, that we would take a trip into the hills, to Williams Creek I think it was, where we had a picnic with the Shoups, and we got home sometime late that evening. That was Tuesday. On Wednesday, to the best of my knowledge—no, going back to Monday—we entertained Mr. Lamborn at dinner, and Tuesday we went on the picnic. On Wednesday we began to talk business; that is, in regard to this deal that was on hand; and Mr. Lamborn was up at the house there, and after talking over the price, and how the payments were to be made, we came to a satisfactory conclusion, and in that original understanding, which was on Wednes-

(Testimony of Harry G. King.)

day morning, I think, up at my house, it was agreed that I was to take so much down, and so much the first of January, and notes to a certain extent, and $20,000.00 in first mortgage bonds; and before consummating that, or before agreeing to it, I called Mr. Richards to one side and asked him providing I agreed to take the $20,000.00 worth of bonds, whether he would take those in part payment of his commission. He said yes, that would be perfectly agreeable to him. Well, I agreed to the terms, because that would eliminate Mr. Richards from the commission by his agreeing to take that part of it in bonds. Before the final deal was made, why they had another proposition to make. After studying the matter over which was presented to me—Mr. Lamborn, I think, did most of the talking that time—they presented a proposition whereby, if it was agreeable to me, to make an issuance of bonds, and each take their proportion of an $80,000.00 issue, figuring the basis of the property at $80,000.00. And I didn't like the look of it, first of all, and yet at the same time I didn't want to block the deal. I was satisfied that I was making a little money on my investment and making a quick turn, and I eventually agreed to this bond proposition; and by the terms of that Mr. Lamborn, I think, was to get his proportion, $22,500.00,—

Mr. CLARK.—Q. That was the written agreement?

A. That was the written agreement. That was the final conclusion that we came to; but there was nothing said in the morning of the Wednesday morn-

(Testimony of Harry G. King.)

ing when we had the temporary agreement up at the house, as to the conditions of the sale; there was nothing said about the issuance of any $80,000.00 worth of bonds at that time. This bond proposition, that was put to me later, and consummated.

Q. Now, Mr. King, it appears that in this case complaint is made of certain representations you are alleged to have made. I will ask you first, what if any representations you made as to the tonnage of this mine?

A. Well, the first representation that was made on that was in answer to a telegram, I think, that I got from Mr. Richards. I haven't got the telegram, because nearly all our telegrams there in Salmon are repeated over the telephone, and we have to sort of make copies of them ourselves. Sometimes they send them over and sometimes they don't. But the request was sent to me by telegram for the estimated production of the mine for the past year, and I answered that about 2,300 tons. That was to the best of my knowledge and belief.

Q. Now, when Mr. Lamborn and Mr. Richards came to Salmon, did you have any further talk concerning the tonnage?

A. Only at the time of the figuring on the issuance of bonds. Mr. Lamborn—

Q. Was that before or after the agreement had been entered into, or before or after—

A. Well, it was the same morning, on the same day that the agreement was entered into.

Q. Well, go ahead and state what transpired

(Testimony of Harry G. King.)
there at that time.

A. Well, they were figuring that providing the tonnage for the coming year would amount to so much, and the expenses of running the property so much, why we would be justified in issuing $80,000.00 worth of bonds, at six per cent., making an interest bearing indebtedness of $4,800.00, which would be amply repaid by the income from the property. That was Mr. Lamborn's figures that he made on it, and it was used in order to persuade me to consent to the issue of these bonds. The remark was made by Mr. Richards in my presence that if the property didn't earn that money if wouldn't hurt us to put up the interest temporarily, until the property did pay it.

Q. Was anything said about the fact as to whether or not this mine would pay, just at that time?

A. The main drift of their conversation with me, and over the issuance of those bonds, was to the effect that if the property held its own for the first few years, we could well afford to wait for a railroad, and then make the big money out of the property.

Q. Now, did you make any further or other representation as to the tonnage, except the representation contained in that telegram?

A. None whatever.

Q. That was the only one representation you made in that regard? A. That was all.

Q. Was that representation true or false?

A. It was true, to the best of my knowledge and

(Testimony of Harry G. King.)

belief, and is so to-day.

Q. Some complaint has been made as to some representation as to the coal in the old workings, or breast of coal in the old workings. I will ask you to state what, if any, representation you made in regard to that?

A. Now, I don't remember making any particular representation with regard to the coal in the old workings, except that it was better in the old workings than it was in the new workings.

Q. Was that the only representation you made in regard to it?

A. Entirely. That was the only representation, that the coal would improve as we went in on it, and that it was a great deal better inside than it was there at the first 200 feet that I understand Mr. Lamborn saw.

Q. Was that representation true?

A. It was—facts have borne it out.

Q. What, if any, talk was had between you as to the expense of mining this coal?

A. Well, it was pretty hard for me to know how much the expense would be; but I figured that that coal could be mined so that we had a profit of $3.00, by proper development and proper management of the property; and my idea was, and I suggested it to Mr. Richards, and I also have insisted, almost, on Mr. Miller sinking a plane on that property, going down on the deep coal, whereby we could open up such large bodies and then mine it at approximately, as Mr. Miller said, about a dollar a ton. If my wishes in the

(Testimony of Harry G. King.)

matter had been respected and carried out, it would not only have developed the property to a very great extent—a much greater extent than they did by pushing that new tunnel, to have sunk a plane down there, which we have had to do this year. Mr. Miller started the plane at my request, since Mr. Richards let go of it, and he knows and I know—I have been down on that plane—that the coal—the seams between those coal layers are entirely eliminated for the first three feet at the bottom. And it is what I have said all the time, if you go down on that plane, that if you go down there, I think now that there won't be anything in that coal that will require but very little sorting. It is a practical demonstration. I have seen it myself. Mr. Miller knows it. The coal is so much better—very little to be sorted—than it was by keeping on that upper part.

Q. Did you make any representations as to the sorting of the coal in the old vein?

A. I never told Mr. Richards or Mr. Lamborn that that coal would not need sorting. I told them the coal would get better, and it has got better; and people to-day, from the output from the very place they couldn't get at, where we are taking the coal to-day, they are simply crying for the coal, and no complaints whatever as a merchantable fuel. I wish to say, too, that in order to develop that property that I had Mr. Miller start the lower tunnel and tunnel further down on the plane that was never contemplated by Mr. Richards and Mr. Lamborn, in order to be able to increase the capacity of the mine in fu-

(Testimony of Harry G. King.)

ture development, and so on. I did this at my own expense; that he has pushed that lower tunnel until he has got into a merchantable coal that he is selling to the public to-day at Salmon, and giving first-class satisfaction.

Q. Now, you entered into this agreement that has been introduced here in evidence—this written agreement between Mr. Richards and Mr. Lamborn and yourself? A. Yes.

Q. And did you make any representation as to what per cent of interest it would pay on the investment?

A. Well, Mr. Lamborn did all the figuring on the financial end of it, with regard to how much it would take to pay interest on a certain bond issue. He was anxious to issue $100,000.00 and I said it was a shame to burden the property with a big indebtedness of that description, when the property didn't get any benefit from the bonds, and it went to the individuals—to saddle it with an interest bearing indebtedness. But he argued me out of it.

Q. Well, did you make any representation as to the investment?

A. No, I made no representation with regard to it. I took the figures as they were put down. Providing the tonnage—the demand in Salmon—was to increase, we figured amongst ourselves—we had the papers there, and figured that providing—this was all providing, Mr. Clark,—providing the increase as we naturally thought it would be, the advent of a railroad with that production would run up to 5,000 tons

(Testimony of Harry G. King.)
a year, just as soon as the railroad came there. Then we could mine the coal cheaper, and it would then pay interest on a much larger bond issue.

Q. Now, Mr. King, has the cost of production of coal increased any since the time you entered into that contract and the present time?

A. Not at all. We are mining it cheaper to-day than ever.

Q. For what reason?

A. For the simple reason that we have got more coal to work on, and the miners have—Mr. Miller made an arrangement with the miners to work it on a tonnage basis.

Q. Now, what are you mining that coal for to-day?

A. $2.00 a ton to mine it—$2.00 a ton—and that is paid to the miners on the net weight of the coal, after it is sorted, and the miners take our weight at the end of the month for the amount of coal that has been delivered right out of the bin. In other words, they don't get paid $2.00 a ton for the coal they mine until after it is sorted—net weight.

Q. And what do you say about your ability to produce—at the present time—have you been able to produce this present year sufficient coal to supply the demand in and about Salmon?

A. Yes. We have had an unlimited demand for coal this winter, on account of it being a very severe winter. We have had the thermometer down to 36 below zero there in Salmon just of late, and it has been running below zero the last month; and of

(Testimony of Harry G. King.)

course the natural tendency of that was to increase the demand for coal, and the demand has strained us materially, because we had not made any particular development; but at the same time we have kept up and filled the majority of orders for the past three months, and also supplied the railroad company with about 150 tons besides. We supplied the railroad company, I think, up to December with 227,000 pounds of coal, we supplied the railroad company at the end of December. I think that was about the figures; I went over them very carefully, and I can tell by refreshing my memory on that document.

Q. Could you have supplied more coal if you had had more tonnage—if you had mined more?

A. Oh, yes, we certainly could. We look after the town trade first, and I have had to shut Mr. Dixon off lately, because I simply said, "The town people have got to be supplied first." Now, last month we sold about 275 tons of coal out of that little mine, at $7.00 a ton. Mr. Dixon, of the railroad company, paid $5.00 at the mine, and took it with no hauling or anything—just took it as it comes.

Q. Now, in addition to the amount that you actually sold out of the mine, could you have furnished any additional tonnage—that is, could you have sold any additional tonnage if you had been able to furnish it? A. Yes.

Q. I show you paper marked Defendants' Exhibit 10, and ask you what it is?

A. This is a certified copy taken from the stubs of the books of the coal mine of the receipts of parties

(Testimony of Harry G. King.)

who have purchased coal, and to whom it has been delivered, from October 1st, 1909, to the first of January following.

Q. Are the prices they paid for it shown there?

A. They are—$7.00 a ton. You will find each amount we figured out there at the rate of $7.00 a ton, and we never had a kick on the price this year at all, there has been such a demand for it.

Mr. CLARK.—We again offer Defendants' Exhibit 10 in evidence.

Mr. RICHARDS.—Objected to as not tending to prove or disprove any of the issues in the case.

Mr. CLARK.—Q. I will ask you if in the year 1908 and 1909, the year that Mr. Richards had charge of it, if he had opened up the coal and properly mined it, could he have produced 2,300 tons from that mine?

A. Unquestionably.

Q. And more than that?

A. Unquestionably.

Q. How much coal per year can be produced from that mine now, under present conditions?

Mr. RICHARDS.—That is objected to as not tending to prove or disprove any of the issues in this case.

WITNESS.—It would only be limited by the number of men that you put to work. There is an unlimited supply of coal there, and the output would simply be limited by the amount of machinery and the number of men that you could put to work on it.

Mr. CLARK.—Q. How many men have you at work there now in the mine?

(Testimony of Harry G. King.)

A. Three men, and they have been getting out all this coal in the last 90 days.

Q. And how many men sorting? A. Two.

Q. How many men have you employed altogether? A. You mean at the present time?

Q. Yes. A. Five.

Q. Five?

A. Well, excuse me, Mr. Clark. In the lower tunnel, there is some men there. I leave that matter entirely to Mr. Miller, to employ the men and discharge them, and so on, and he runs the mine to the best interest as superintendent, and I leave the handling of the mine and the employing of the men entirely to him. I really don't know exactly, but I understood him that there were three in the upper tunnel—and how many down below, Mr. Miller?

Mr. F. C. MILLER.—Two.

WITNESS.—Two—that's what I thought, yes.

Mr. CLARK.—Q. Five, altogether?

A. Yes; and the sorters.

Q. And how many sorters?

A. Two sorters.

Q. Since your residence in Salmon have you become acquainted with the prices of land and the market value of land of the character of this 480 acres?

A. I am well acquainted with the values of land in our county, for the simple reason that in my official position I think I might safely say 95 per cent of the real estate transfers that have been negotiated for the last year have been transactions that have gone

(Testimony of Harry G. King.)

right under my personal supervision, through the bank—the financial end of it.

Q. Were you so acquainted with the market value of land on the 30th day of July, 1908?

A. I was.

Q. Leaving out of consideration the coal mine on this property, and assuming that no coal mine was located on this 480-acre tract of land; what was the market value of that land on July 30th, 1908?

Mr. RICHARDS.—Objected to as irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case.

WITNESS.—Well, I would figure about—July, 1908?

Mr. CLARK.—Q. Yes, that is the first question I asked you—July, 1908.

A. About $75.00 an acre.

Q. What was the market value of that land on January 1st, 1909?

Mr. RICHARDS.—The same objection as before.

WITNESS.—January, 1909?

Mr. CLARK.—Yes.

A. That is a year ago?

Q. Yes.

A. Well, values had not begun to increase at that time.

Mr. RICHARDS.—That is this year, Mr. King.

WITNESS.—No—this is 1910—January a year ago.

Mr. CLARK.—No—a year ago.

Mr. RICHARDS.—Yes—I was mistaken.

(Testimony of Harry G. King.)

WITNESS.—I would figure approximately about the same in January, 1909. There might have been a little increase.

Mr. CLARK.—Q. Well, when was it that prices began to increase?

A. It was soon after the beginning of January, 1909, that we got assurances that the railroad would be built, and values began to jump immediately—just after January, 1909.

Q. Take as a basis March 1st, 1909, what would you say the value of it was at that time?

Mr. RICHARDS.—The same objection as before.

WITNESS.—Well, I would figure it at $100.00 an acre, at least.

Mr. CLARK.—Q. And what is its present value?

Mr. RICHARDS.—The same objection as before.

WITNESS.—$150.00 an acre. I am basing these on comparative prices of land that has actually been transferred from one party to another for a legitimate consideration, in proportion to the distances from town.

Mr. CLARK.—Q. Will you describe where this land is located, and what its character is?

A. It adjoins the townsite on the southwest, and lots within 150 feet of this land.

Mr. RICHARDS.—Just a moment. He is asking you to describe the land—not the lots.

Mr. CLARK.—Q. What is the character of the land? What can it be used for?

A. Principally for fruit and agriculture. It is more adapted for fruit, I guess. I think it is the best

(Testimony of Harry G. King.)
fruit-growing land in the county.

Q. What makes it the best fruit-growing land in the county?

A. Because it is what they call bench lands there. It sets up on the bench. It is high and dry and of a sandy loam—no alkali—and it is best adapted for fruit-raising. Bench lands are supposed to be the most valuable lands in our county.

Q. Do you have any way of estimating the market value of this coal property except by what it is producing—the coal mine itself?

A. You mean the whole property?

Q. No—the coal mine, excluded from the land?

A. Excluded from the land?

Q. Yes.

A. Well, the mine this last year has produced—

Mr. RICHARDS.—Just a moment—answer his question.

Mr. CLARK.—Q. The value of the mine, leaving the question of the land out of consideration?

A. What would I value the coal mine at?

Q. Have you any way of estimating the value of the coal mine?

A. Only on the production, and being the only coal mine in the state that is being worked to any advantage, or, rather, to any extent, that with the advent of a railroad it seems to me it will be a great proposition.

Q. Is the mine a better mine than it was when you purchased it from Mr. Pollard?

Mr. RICHARDS.—Objected to as irrelevant and

(Testimony of Harry G. King.)

immaterial, and not tending to prove or disprove any of the issues in this case.

WITNESS.—Undoubtedly.

Mr. CLARK.—Q. In what respect is it better?

Mr. RICHARDS.—The same objection.

WITNESS.—By improvements and developments; the showing at present is so much greater than it was when I bought it from Mr. Pollard.

Mr. CLARK.—Q. What, if any, misrepresentation did you make to either Mr. Lamborn or Mr. Richards concerning this property, in any particular?

A. I made no misrepresentation at all.

Q. After Mr. Richards and Mr. Lamborn inspected this mine, did they express to you their opinion of it?

A. It seems to me that Mr. Lamborn was very much enthusiastic about it.

Mr. RICHARDS.—Just a moment. Just answer the question, please.

WITNESS.—What is the question, please?

Mr. CLARK.—Q. Did they express to you their opinion about the mine, as to whether it was a good mine or not?

Mr. RICHARDS.—Now, just answer the question.

WITNESS.—What was the question again, Mr. Clark?

Mr. CLARK.—Q. Did they express to you their opinion as to whether this was a good mine or not?

A. They did.

Q. State what they said.

Mr. RICHARDS.—Q. Objected to as irrelevant

(Testimony of Harry G. King.)
and immaterial, and not tending to prove or disprove any of the issues in this case.

WITNESS.—They thought it an exceptional good property, with a fine future.

At this time a recess was taken until 1:15 o'clock P. M.

At 1:15 o'clock P. M. the further taking of testimony was resumed.

HARRY G. KING, a witness heretofore produced by the defendants, and duly sworn, resumed the witness-stand for further direct examination, and testified as follows, to wit:

Direct Examination (Continued).

(By Mr. CLARK.)

Q. Mr. King, was there some $2,500.00 transaction between you and Mr. Richards about the time this agreement was entered into?

A. That was the time the first payment was made.

Q. The $7,500.00 payment? A. Yes, sir.

Q. Just state what that was, Mr. King.

A. Well, Mr. Richards told me there was no question about the deal going through with Mr. Lamborn, as it was entirely in his hands, and that in order to show Lamborn that he was putting up his part he wanted me to furnish $2,500.00 so that he could go to the bank in Higgins, Texas, and then when the final payment was made, or the transfer was made, he could just give a check for $2,500.00, assuming that to be the payment. In reality there was nothing but an exchange of checks between Mr. Richards

(Testimony of Harry G. King.)

and myself. I did so especially at his request, entirely.

Q. One further question, Mr. King: It appears from your statements that this property is of very considerable value, in your judgment. Why, if that property is of that value, are you contesting this suit?

Mr. RICHARDS.—Objected to as wholly irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case.

WITNESS.—Well, for the only reason that it is not a matter of financial importance to me as much as to the effect that I have been materially injured with regard to representations that have been made in this litigation by Mr. Richards and Mr. Lamborn, and the humiliation that it has given me in my position over there, and to my family, by tying up all my assets, not only the coal mine, but in point of fact tying up my home where we live; and I don't feel that any amount of money would reimburse me, to just sit down and give up this suit and say, "You folks were right and I was wrong." That is as good an explanation as I can make of it. Mrs. King and I have talked it over and came to that conclusion. It is not a question of money at all.

Cross-examination.

(By Mr. RICHARDS.)

Q. Then, so far as the property is concerned, you would cheerfully take it back, if that was the only question? A. Yes, sir.

Q. And return the notes and money?

A. Yes, sir.

(Testimony of Harry G. King.)

Q. Do you say there was no payment at all made by Mr. Richards of this $2,500.00?

A. I'll tell you exactly how that was done, Judge: The $2,500.00 was a fictitious transaction entirely; but after Mr. Lamborn had gone, to all appearances Mr. Richards had given his check for $2,500.00, and he had gone to the railroad with Mr. Lamborn and had come back to me, then we figured out that he could not see how he could get away from taking that quarter interest; that he could not blind Mr. Lamborn any further; that he had to go through with the deal and take that quarter interest, and we fixed it up. He gave me his note for $1,500.00 and the cash for $1,000.00.

Q. Then he paid you exactly according to the agreement, didn't he?

A. No. According to the agreement, it was to have been paid on the day the deal was made.

Q. As to the amount, he paid you exactly according to the agreement, didn't he?

A. He did afterwards.

Q. Yes—that is what I am asking.

A. Afterwards.

Q. Then, as far as that transaction is concerned, you had full payment, according to the terms of the agreement, from Mr. Richards?

A. About ten days after the date of the agreement.

Q. Will you answer my question? Did he pay you in full, according to the terms of the agreement?

A. He did.

(Testimony of Harry G. King.)

Q. You claim that he was trying to deceive Mr. Lamborn?

A. I don't make any claims at all, because I don't know what he was trying to do.

Q. Well, you say he was trying not to show his hand?

A. That was his explanation to me.

Q. Then you knew that he was trying to deceive Mr. Lamborn, did you?

A. It looked that way to me.

Q. And you were willing to help him do it, were you? A. At his request.

Q. You are willing to do a wrong thing if anybody requests you to do it?

A. Well, there was nothing wrong on my part.

Q. You were willing to deceive Mr. Lamborn, if Mr. Richards wanted you to?

A. Well, I did it under those circumstances in that case.

Mr. RICHARDS.—Well, that's all right; you and he are on the same level, then.

[Testimony of F. M. Pollard, for Defendants.]

F. M. POLLARD, a witness produced on behalf of the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. CLARK.)

Q. State your name, residence and occupation.

A. F. M. Pollard; my residence is Salmon, Idaho; and, I don't know, I have ranched and mined and

(Testimony of F. M. Pollard.)
made brick. I am making brick at the present.

Q. How long have you lived in the vicinity of Salmon, or in the City of Salmon?

A. Oh, 34 or 35 years.

Q. Are you acquainted with the coal mine known as the Pollard mine, which Mr. King purchased?

A. Yes, sir.

Q. That is the mine concerning which evidence has been given in this case? A. Yes, sir.

Q. Are you the Pollard after whom this mine was named? A. Yes, sir.

Q. And you were the owner of this mine at one time? A. Yes, sir.

Q. How long was this mine in your possession, and how long were you the owner of it?

A. Well, I owned the ranch—oh, long before I found the coal. I think we discovered coal there in about 1900.

Q. Did you do any development work there?

A. I did, up to the time I sold to Mr. King.

Q. And when was that?

A. 1907. He took possession the first of September, 1907. The trade was made, I think it was in February the option was given—perhaps March.

Q. What was the character of this coal deposit, as it appeared to you at the time you sold?

A. Why, it was a fair lignite coal. It wasn't the best, though, compared—we sent samples of the coal to different places to be analyzed, and they compared it favorably with Pleasant Valley coal, and Simms, North Dakota, and a mine in Washington, I forget

(Testimony of F. M. Pollard.)
the name of it. I did try to get the analysis itself, but it has been misplaced.

Q. Have you seen the mine since Mr. King has had possession of it?

A. Oh, yes, several times.

Q. I will ask you as a general proposition whether or not that mine, for its coal deposits, appears more valuable to you now than it did at the time you sold it?

Mr. RICHARDS.—Objected to as irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

WITNESS.—Well, I think it is better.

Mr. CLARK.—Q. How?

A. I think it is better.

Q. In what respect?

A. Well, they have opened the lower tunnel that I had started, and they worked in something over 100 feet, and I think we measured it five feet and a half of very good coal the day before we started—as good as the best we have ever had.

Q. Now—

A. That eliminates the sand streaks; and they have got five and a half feet of workable coal, really better than usual.

Q. That is in the portion of the mine that was caved in when Mr.—

A. No, sir. The new tunnel—this lower tunnel that I speak of, is an entry that was started several years before, lower down. There is an incline, and this was about 60 or 70 feet further down the creek

(Testimony of F. M. Pollard.)
—on below the creek. We worked above the old tunnel, and the water is so bad in there they couldn't work, and they went on the lower level, and they could work up to the old tunnel again.

Q. And you say they have a five and a half foot vein there of practically good coal?

A. Yes. The same streaks are there; but that is the measurements of the coal.

Q. What do you mean by that?

A. Well, we marked off the sand streaks, you understand.

Q. There was five and a half feet, then, of coal, excluding the sand streaks?

A. Yes, excluding the sand streaks—or about that.

Q. How would you say that five and a half feet of coal compared with this sample? (Exhibiting sample marked as an exhibit.)

A. Well, we have samples over in the sack of all of this at the hotel. The lower three feet is very much like this. We have samples of every seam. There are six seams in the vein—always have been—and I am familiar with every seam. That is, one seam lies on another, in this manner, and there is a little streak of sand between them, or slate.

Q. Now, just go ahead and explain that situation.

A. You will notice here a little streak there; this is the second streak from the bottom, this coal (indicating Defendants' Exhibit 9), and I think it is about nine inches thick, this one—clean coal. The

(Testimony of F. M. Pollard.)

next one appears to be about ten inches, the one above this. Now, the next streak varies a little. We measured in one end of the drift, and it was, I think, 26 inches, and another place 23, and I don't quite understand the variation, but it measured that way. That is the three bottom streaks. The others were just marked out, you know; we didn't measure them separate, the three upper ones. We estimated it would be a good three feet of this character of coal, and I made an estimate that we ought to be able to get 3,000 tons to the acre of that character of coal.

Q. Of this particular coal?

A. Yes. The other is a little heavier in carbon, but not so clean. You will understand that that measures a little more than three feet; but we made the estimates that there would be undoubtedly three feet of this character of coal.

Q. Now, that is the face of one vein?

A. That is the face of all the veins. There is only one vein there. Well, I say one vein—this is the lower vein—the lower part of the same vein. The upper vein is spotted; that is, sometimes we have good coal for a little ways, and then again it will turn into a good deal of clay and sand and mixtures.

Q. Now, Mr. Pollard, just take from this sack the different samples.

A. That is the character of the upper seam, the top of the vein that we worked, and apparently about the thickness of it, and it stands—you know it is this

(Testimony of F. M. Pollard.)

way (illustrating). This is the upper seam of the main seam.

Mr. RICHARDS.—Q. Do you mean that is the upper seam of the lower part of the vein?

A. Yes; that is the top. The other one is very similar to that. There are the two characters of coal.

Mr. CLARK.—Now, I wonder if we can't mark that?

(Said sample was thereupon marked Defendant's Exhibit 15.)

Q. Now, is there any other character of coal?

A. The three upper streaks are similar to that—no; there is another streak or seam similar to that, and the next one below it is what we generally or usually designate as the bone seam, and about half of it is workable, and it is about the same thickness. There is a little seam of white iron cuts it in two in the middle, and it has always followed the vein ever since I have been there. That is the middle seam, or the fourth seam from the bottom, or the third from the top. I dug these myself, you know.

Q. Now, let me ask you—if you will sit down, Mr. Pollard—I show you again Defendants' Exhibit 9, and ask you how much of this particular kind of coal is found in this particular vein; that is, I mean what the thickness of this particular coal is in this particular vein you are speaking of?

A. In this lower tunnel?

Q. Yes, in this lower tunnel?

A. Well, it would work and give a good three

(Testimony of F. M. Pollard.)

feet. It measures more than that, but it will work —it is workable three feet of it.

Q. Now, that is clear coal, is it?

A. That is what we designate fair lignite coal, or brown coal.

Q. Now, in this lower tunnel, how much of this Defendant's Exhibit 15 is found?

A. There are two seams of that character, almost identical. I think, though, that the other is a little thicker—perhaps an inch and a half—than this one.

Q. And the Defendants' Exhibit 15 represents the thickness of the seam from which that was taken?

A. Yes. And there is another seam we call the bone seam, about half of that. It is about eight inches, and it is the fourth seam from the bottom and the third seam from the top.

Q. Now, in what kind of a formation does this vein lie? It lies flat, does it?

A. Well, no; it is an incline, and changes some. One room might work—I think we made it 29 degrees, and in other places 15.

Mr. RICHARDS.—Q. 29 degrees below a horizontal?

A. Yes, and the coal is stoped, enough sometimes to run the chute, where it is mined in the bottom.

Mr. CLARK.—Q. What is the extent of that deposit of coal of this character?

A. Well, that would be pretty hard to say. The nearest that I have got at it, there is a fault about half a mile South of the ranch that I took up on the

(Testimony of F. M. Pollard.)

river, and in that fault there are seven veins exposed, and they vary all the way from one foot and a half to seven or eight feet, and there is from 50 feet to 200 feet of solid sandstone between those veins. So now you can see into the ground as far as I can; but that is what I am taking my basis from.

Q. From your knowledge of the mine, how much coal of this character could be produced, by proper working, in a year's time, say?

Mr. RICHARDS.—Objected to as irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case.

WITNESS.—Well, that would depend. The amount of coal that could be got out by running a stope down on the vein, in a proper way, outlining rooms at right angles either way from this main slope, you can open as many rooms as you desire. Of course, it would take machinery and pumping-plants and all that to do it properly; and with the proper amount of money for development work, why that would be reached out indefinitely.

Q. (By Mr. CLARK.) As the mine is now opened and is now being worked, with the coal exposed at various places, how much would you say could be mined from that mine in say a year's time?

Mr. RICHARDS.—Objected to for the same reason as above given.

WITNESS.—Well, when we worked it we had an irregular demand; sometimes we had a great demand during very cold weather, and it is pretty hard for a man without means to always be prepared, and

(Testimony of F. M. Pollard.)

we generally had from one to three rooms in readiness, and the most we ever got out in any one month is about 230 tons.

Mr. CLARK.—Q. Now then, assuming that there was sufficient demand to take all the coal that you could mine from that mine as it is being worked at the present time, with the coal exposed that is now exposed, working on the breasts as they are now exposed, and doing a proper amount of development work; how much coal could be produced from that mine?

Mr. RICHARDS.—Objected to for the same reasons above given.

WITNESS.—Well, it depends on the way it is done. With proper work there—they would have to make a little change in it—that is the way I look at it—with a little change in the working of it, why I think there could be 50 tons a day produced, with a night and day shift.

Mr. CLARK.—Q. Then, as I understand you, the production of this amount merely depends upon the amount of the demand?

A. Yes. They can get any quantity of coal by fixing for it—it amounts to just that.

Q. You sold this land and mine to Mr. King?

A. Yes, sir.

Q. For what price? A. $30,000.00.

Q. And are you familiar with the market value of land of the character of this 480 acres; and were you familiar with it on the 30th day of July, 1908?

A. Well, that is a pretty hard question. I am

(Testimony of F. M. Pollard.)
not to say familiar with it, but I can tell you what I think about it, if it will do you any good.

Q. Well, I don't suppose that would be competent, Mr. Pollard. Have you since became familiar with the market value of the property?

A. Yes, sir.

Q. And at what time would you say you were familiar with the market value of this land?

A. The last summer.

Q. The last summer—the summer of 1909?

A. Yes, sir.

Q. What was the market value of this land, assuming that there was no coal mine on the property at all, during the summer of 1909?

Mr. RICHARDS.—Objected to as incompetent, irrelevant and immaterial, and as not tending to prove or disprove any of the issues in this case.

WITNESS.—Well, I should say that it would be cheap land at $100.00 an acre, the way others are selling. I would be safe in saying that, without fear of contradiction.

Mr. CLARK.—Q. And at the present time?

Mr. RICHARDS.—The same objection.

WITNESS.—Well, the values have raised so fast that I wouldn't hardly dare say; but it is double.

Mr. CLARK.—Q. Well, what do you think the present value of that land is, if you know,—the market value?

Mr. RICHARDS.—The same objection.

WITNESS.—Well, if I owned it now I wouldn't take $250,000.00 for the property.

(Testimony of F. M. Pollard.)

Mr. CLARK.—Q. Have you any interest in this lawsuit in any way, Mr. Pollard?

A. Not a cent, one way or another. You will understand I mean with the coal measures and the land. When I say $250,000.00 I mean with the coal measures and land and all.

Q. You mean the total value of the property?

A. Yes—the total value of the property.

Q. And how much would you consider the land worth, separate and apart from the coal mine, at the present time?

Mr. RICHARDS.—The same objection as above.

WITNESS.—Well, I base my values on sales that have been recently made. I know of sales having been made of $200.00 an acre.

Mr. CLARK.—Q. How is this land situated to make it valuable, and what makes it so valuable as that?

A. Well, in the first place, it is owing to the corporation on the West—North Salmon—what we call Brooklyn—the North Salmon; that is the same as the incorporation of Salmon City. You see, it is an addition—this North Salmon.

Q. Did you ever have any talk with Mr. Richards about the value of this land, and as to whether or not you had sold it too cheaply?

A. Yes. One time I met Mr. Richards right in front of our house.

Mr. RICHARDS.—Well, just a moment, Mr. Pollard. He is only asking if you had the talk.

(Testimony of F. M. Pollard.)

WITNESS.—Oh, yes—excuse me.

Mr. CLARK.—Q. Did you have such a talk?

A. Yes, we had a little talk.

Q. When was that?

A. Well, I don't know the date.

Q. About when was it?

A. Some time last fall or early in the winter. I would take it, it would be along about December.

Q. December of 1909? A. Yes—

Q. Eh?

A. No—1908, I guess. Yes—a year ago last December; that's what I mean.

Q. Then, it was in December, 1908?

A. Yes; I take it to be about that.

Q. Just state what that conversation was?

A. I met Mr. Richards on the street—

Mr. RICHARDS.—Just a moment, please, Mr. Pollard. That is objected to for the reason that it does not tend to prove or disprove any of the issues in this case.

Mr. CLARK.—Now, you may go ahead and state.

WITNESS.—And I passed the time of day with him, and I asked him how things were looking at the mine. "First rate," he says, and he says, "Mr. Pollard, how did you come to sacrifice your property in the way you did?" Well, I answered him that I had, in developing the property, got in debt some, and felt as though I wanted to pay my debts. That was all that was material that I can see. There might have been some other words said; I don't remember.

(Testimony of F. M. Pollard.)

Q. For what purpose is this land valuable as agricultural land?

A. It is good agricultural land.

Mr. RICHARDS.—The same objection as above.

Mr. CLARK.—Q. To be used for what purpose?

A. Why, we raise enormous quantities of hay on that land. I have raised as much as five tons per acre, in two cuttings of alfalfa, and three tons of timothy and clover to the acre, 60 bushels of wheat to the acre, and 90 bushels of oats to the acre.

Q. Have you got a good water right to this land?

A. Well, we have never been short of water, only in the latter part of August our water right is secondary; but there has always been an abundance of water; there never was a failure of crops.

Cross-examination.

(By Mr. RICHARDS.)

Q. How far is this coal property from your Main Street in Salmon, Mr. Pollard?

A. From the main street?

Q. Well, from the main business center?

A. You mean the postoffice, I presume,—the center of town—about two miles and a quarter—maybe a little over—somewheres in there.

[Testimony of F. C. Miller, for Defendants (Recalled).]

F. C. MILLER, a witness heretofore produced on behalf of the plaintiffs, and duly sworn, being recalled by the defendants, testified as follows, to wit:

Direct Examination.

(By Mr. CLARK.)

Q. Mr. Miller, are you familiar with the value, the market price of this 480 acres of land, and were you familiar with the market price on the 30th day of July, 1908?

A. Why, I can't really say that I am thoroughly familiar with the prices of land; I haven't given it much attention.

Q. And you haven't given it attention since that time?

A. No. Not being very much interested in the purchase of it, I haven't looked into the matter very thoroughly.

Q. I will ask you, Mr. Miller, if you heard Mr. Pollard's testimony as to the coal in these veins, as shown by Defendants' Exhibit 9 and Defendants' Exhibit 15?

A. I have. I was there when Mr. Pollard took them out.

Q. And how did it seem to you? I wish you would explain those veins as they appeared to you.

A. Well, this was the upper portion of the vein.

Q. Which do you mean—Defendants' Exhibit 15?

(Testimony of F. C. Miller.)

A. Yes, Defendants' Exhibit 15; and there was, as I remember it, about three feet of that coal, just as you see it here, lying next to this here carbonaceous matter.

Q. You mean three feet in thickness?

A. In thickness down, yes.

Q. And under that was the coal marked Defendants' Exhibit 9? A. Yes.

Q. Does that exhibit truly represent the character of the vein in this mine?

A. It does, at that particular point.

Q. Well, generally?

A. Well, not throughout. This is really better coal than we get away up above—up on higher, in the old workings.

Q. But does that exhibit truly represent the condition of the vein in the lower workings?

A. Yes.

Q. And the vein is not so good up in the upper workings?

A. Well, there is a great deal of coal that is equally as good as that; but it doesn't seem to be quite as wide. It hasn't the width that it has down there.

Cross-examination.

(By Mr. RICHARDS.)

Q. You say those exhibits came from the lower workings? A. That is, the lower tunnel.

Q. How extensive are those workings?

A. We are not in there over 100 feet from the portal of the entry.

(Testimony of F. C. Miller.)

Q. And that is about how much lower on the incline than the workings above?

A. Oh, probably about 60 or 70 feet.

Q. And how much perpendicular, about?

A. Oh, about 18 or 20.

Q. For whom are you working over there, superintending this mine?

A. As I understand it, it is the Idaho Coal & Land Company.

Q. And they are paying you $1,800.00 a year?

A. Yes, sir.

Q. Have they paid you?

A. Why, not fully.

Q. How much do you lack?

A. Here just a short time ago I received a note from the President of $1,200.00.

Q. Who is the President?

A. Mr. King—H. G. King.

[Testimony of Harry G. King, for Defendants (Recalled).]

HARRY G. KING, a witness heretofore produced on behalf of the defendants, and duly sworn, being recalled by the defendants, testified as follows, to wit:

Direct Examination.

(By Mr. CLARK.)

Q. Mr. King, are you familiar with this agreement that has been introduced here in evidence, that you executed on the 30th day of July, 1908?

A. Yes, sir.

(Testimony of Harry G. King.)

Q. And which is attached as an exhibit to the bill? A. Yes, I am.

Q. And you are familiar with the matters in that agreement which you were to do—which you were to comply with? A. Yes, I am.

Q. Have you complied with the conditions of that agreement, so far as that agreement calls for anything to be done on your part? A. I have.

Q. And did either Mr. Richards or Mr. Lamborn ever give you any other reason for refusing to go any further in this matter except the statement as to misrepresentations?

Mr. RICHARDS.—Objected to as leading.

WITNESS.—No.

Mr. CLARK.—Q. Did they give you any reason for refusing to go any further with this matter?

Mr. RICHARDS.—Objected to as leading.

WITNESS.—None whatever.

Mr. CLARK.—Q. There was some reference made to the fact that you had stated that you had furnished 300 tons of coal to the Copper Queen mine. I will ask you to state what, if anything, you stated as to the Copper Queen mine, and what, if any, representation you made in that respect?

A. My representation of 2,300 tons included the estimate of the coal that went to the Copper Queen mine.

Q. Did you tell them how much that was?

A. I can't tell that exactly, because the coal was being shipped out there and being hauled by freighters, and each time they would send me a check in;

(Testimony of Harry G. King.)

and the only way I had at that time of keeping any accounts of it—not having anybody to account for, the mine being mine—was simply to weigh the coal and take the stub and send the stub in of the weight, and they would send me a check for it; and I can't say exactly how many tons were delivered there.

Q. Did you make any specific representations to either Mr. Lamborn or Mr. King, as to how many tons were delivered there? I mean to Mr. Richards or Mr. Lamborn?

A. It was my impression—

Mr. RICHARDS.—Just a moment. Answer his question.

Mr. CLARK.—Q. Did you make any specific statement? A. No specific statement.

Q. Was or was not the coal which had gone to the Copper Queen mine included in your estimate of 2,300 tons? A. It was.

Cross-examination.

(By Mr. RICHARDS.)

Q. You were the owner of this mine at the time that the 2,300 tons mentioned was taken out, were you not? A. I was not—not all the time.

Q. Just a moment—answer my question: You had control of the mine for that time?

A. For that full year?

Q. For the time this 2,300 tons was taken out?

A. No.

Q. Who had control of it?

A. Mr. Pollard part of the time, for six months.

Q. How much did he produce?

(Testimony of Harry G. King.)

A. About half.

Q. About half of what?

A. About half of the 2,300 tons, I would estimate.

Q. What do you base that estimate on?

A. On Mr. Pollard's word, and also on what my estimate was of my production. I had only owned the property for six months.

Q. Well, if you would answer my questions we would get through in half the time. What basis had you of knowing what Mr. Pollard produced during that time?

A. From conversations with Mr. Pollard.

Q. You didn't know anything about it, other than his statements? A. That's all.

Q. What knowledge had you as to what you produced during the time you had it?

A. My own estimates.

Q. Estimates on what?

A. On the sales of coal.

Q. Didn't you know how many sales you made?

A. I couldn't tell.

Q. Didn't you know how many sales you made?

A. I did not, no.

Q. Who did know?

A. Why, for the simple reason that I simply had the one ticket, and all my conclusions were made on that one ticket.

Q. Did you know how much money you collected for that coal? A. I couldn't tell that.

Q. Answer my question—did you know?

A. It is impossible for me to answer.

(Testimony of Harry G. King.)

Q. You won't give any further answer than that?

A. I can't possibly answer.

Q. Did you receive all the money from the sale of that coal during that time?

A. The majority of it, yes.

Q. You knew how much you received, didn't you?

A. Each day?

Q. You knew how much you received for the sale of that coal, did you? A. I did, at the time.

Q. You knew what the coal sold for per ton, didn't you? A. Yes, sir.

Q. And you knew how many tons from that, didn't you?

A. I did not. I never figured it up exactly.

Q. Why didn't you figure it up exactly?

A. For the simple reason that I had no occasion to; and the only estimate I gave him was over the telephone—or, rather, when I answered that telegram, estimated figuring so much a day.

Q. Well, you had in your records the amount of money received, didn't you?

A. I never kept any record.

Q. Then you made the statement without knowing it was true, didn't you?

A. To the best of my knowledge and belief it was true.

Q. And upon what did you base your belief?

A. On the production of the mine, and the sales.

Q. And how did you know the production of the mine? A. On what I received.

Q. And the price per ton? A. Yes, sir.

(Testimony of Harry G. King.)

Q. Then you did know how much it produced, when you made that statement?

A. Approximately, I did.

Q. And you based it upon your knowledge of what it produced?

A. Yes, sir, approximately.

Mr. CLARK.—Q. And that statement was true, wasn't it, Mr. King?

A. To the best of my knowledge and belief, it was.

Mr. RICHARDS.—Q. Isn't it a fact that your stubs show you didn't produce 1/6 of that?

A. I didn't have the stubs.

Q. Aren't those stubs here in court?

A. They are not here. The coal was weighed before me—

Q. I am asking about what you produced?

A. That is only part of what we produced, Judge.

Q. I understand that; but between the dates that are mentioned in those stubs you produced just what is on those stubs, didn't you?

A. If all the stubs are there.

Q. Well, aren't they?

A. I don't know. I never had possession of these stubs.

Q. Then, all your statements were based upon lack of knowledge, were they?

A. No; I approximated it according to the amount of coal that was going out.

Q. Well, I want to know whether it was based on knowledge or lack of knowledge; which was it?

A. Well, it was practically on knowledge.

(Testimony of Harry G. King.)

Q. Then, you didn't know it was true?

A. Well, I did approximately know that it was true. My estimate was only approximate, and that is the answers I have given all the way through.

Q. You made a pretty large approximate, didn't you?

A. Well, I might not have underestimated it.

Q. You didn't try to underestimate it?

A. I didn't try to overestimate it.

Q. Well, will you answer my question?

A. What was your question, Judge?

Q. I asked you if you tried to underestimate it?

A. I can't say that I did.

Q. You won't say that you did not?

A. No.

Mr. RICHARDS.—That's all, I believe, Mr. Clark.

Mr. CLARK.—That's all.

CERTIFICATE.

United States of America, for the
District of Idaho,
Southern Division.

I, Daniel Hamer, Special Examiner, do hereby certify that the witnesses, C. Albee, Harry G. King, Arthur H. Lamborn, F. C. Miller, F. M. Pollard and John G. Richards, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said testimony was taken pursuant to an order of Court and stipulation of the respective parties, at the office of Clark & Budge, at Pocatello, Idaho, be-

ginning on the 10th day of January, 1910, and concluding on the 11th day of January, 1910; that the parties were present at the taking of said testimony by their respective counsel, as set forth; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand, this 10th day of February, 1910.

DANIEL HAMER,
Special Examiner.

[Endorsed]: No. 131. Depositions. Filed March 1, 1910. A. L. Richardson, Clerk.

Plaintiffs' Exhibit "E."

THE FIRST NATIONAL BANK,
of Salmon,

Salmon, Idaho, Oct. 30, 1907.

Friend Dick:—

Glad to get your letter. I think you are taking the right course and hope to see you come up with M A, B. A, C E or some other "Hieroglifphics" after your name. Everything is looking exceptionally good out here, McQuarrie came with his party and they seemed more than satisfied. Notwithstanding the fire, I think they had concluded to take the "Bull of the Woods." Dan says McQ promised to send the $500.00 on his return, I will advise you when it comes and put the proportion to your credit. I enclose statement of your a/c as requested.

The coal business is a Bonanza and I am more than satisfied that the thing to do is to hold it for awhile

and Dec. 1st I will have deed to the whole thing, then there will be no hurry in handling it as I feel sure that a R. R. would make it worth $250,000.00 and it cannot depreciate as a local proposition without a R. R. I have delivered since Sept. 1st in town 450,000 lbs. of coal and no cold weather yet. I have pushed the tunnel 100 ft. further and the coal is 25% better, and holds its thickness.

You can send me the $1000.00 and I will send you note for same, this will help out as I had nearly all the balance, and when you think the time is ripe, we can talk up a deal and I will have the mine in slick shape as to show it to best advantage as I am not stopping but getting plenty of coal by pushing the tunnel which is only developing the mine.

I could have sold the mine the other day for $50,000 but I am sure it will be just as easy in the spring to get $100,000, as it will now pay good interest on that amount. I am so anxious to get it in my name, then we will be in proper shape to do what may be best.

The girls had a great party at house last week of course "Dick" was missed. Shoups give a party Friday, and so it goes.

All send kindest,

From your Friend,

H. G. KING.

Since writing above, I saw Langee and took the McQuarrie note of him and have credited you with commission which cleans up that deal.

Plaintiffs' Exhibit "F."

THE FIRST NATIONAL BANK
of Salmon,

Salmon, Idaho, Dec. 9, 1907.

Friend Dick:—

I woke up on receipt of your letter and was surprised you had not answered my epistle of about a month ago which was written promptly on receipt of yours with enclosures. I am anxious that you get that letter, because it contained an obligation of mine. You first write from Golden and then from Denver which makes it hard to get your proper address, but I think my previous letter was addressed to Golden c/o School Mines. We are all well and happy. Ther. 12 below the last 3 nights which makes it hard on the "Coal Man." Say Dick, the Coal Mine is a trump, have delivered over 500 tons already at $6.00 and Miller is opening her up in fine shape, you would not know it now. Have a big tunnel; use a mule on the cars, 3 ft. track 16 lb. rails, large blacksmith shop, 1 wagon, office, new shoots and screens, our own scale and everything up to date, the outlay cost about $2000.00 but it was money well spent. McQuarrie thinks it is worth ¼ million, and the people here seem to think the same thing now. The R. R. surveyors are cross sectioning.

Judge Elder is dead and burried. We are on a Cash Basis here and don't notice the hard times very bad.

Wishing you a merry, happy and prosperous Xmas,

I am, your friend,

H. G. KING.

Am reg. this so as to know if you get it.

Plaintiffs' Exhibit "G."

AGREEMENT.

THIS AGREEMENT, made this 1st day of March, 1908, between H. G. King of Salmon City, Idaho, and J. G. Richards of Denver, Colorado. The said King agrees to sell to said Richards coal land embracing 480 acres, more or less, patented land, and all appertaining thereto, situated at Salmon City, Lemhi County, Idaho, and known as the King Coal Mine, for the sum of Eighty Thousand Dollars ($80,000.00) subject to the following conditions.

$40,000.00 to be paid on or before January 1st, 1909, provided a payment at least of $10,000.00 be made by July 1st, 1908; $40,000.00 on or before January 1st, 1910.

The said King also agrees at time of first payment to place a good and sufficient deed in escrow with the Pioneer Mercantile Company of Salmon City, Idaho, for said coal property, and to furnish an abstract for same.

H. G. KING.
J. G. RICHARDS.

Plaintiffs' Exhibit "H."

THIS AGREEMENT, made this 30th day of July, 1908, by and between Harry G. King and Maria J. King, his wife, of Salmon City, Lemhi County, Idaho, the parties of the first part, and Arthur H. Lamborn of Montclair, New Jersey, and John G.

Richards of Higgins, Lipscomb County, Texas, the parties of the second part;

WITNESSETH:

That for and in consideration of the mutual covenants and agreements hereinafter contained, as well as the payments of money hereinafter provided for, the said parties of the first part hereby agree to convey by warranty deed to "The Idaho Coal and Land Company, Limited," a corporation hereinafter described, to be organized, the following described lands situated in the County of Lemhi, State of Idaho, to wit: The Southwest quarter and the Southeast quarter of Section one, and the Southeast quarter of the Southwest quarter, and the South half of the Southeast quarter, and the Northeast quarter of the Southeast quarter of Section two, all in Township 21 North of Range 21 East of the Boise Meridian, together with the minerals and mineral veins therein contained, and all ditches and water rights and other improvements connected therewith. The said deed shall convey the said property free and clear of all encumbrances and the said parties of the first part will furnish with the said deed an abstract of the title to the said land, showing the same to be free and clear therefrom. The deed shall be executed on or before the first day of January, 1909, and shall be placed in escrow with a depository hereafter to be agreed upon by the said parties, to be delivered to the said corporation upon compliance with the terms and conditions of this agreement.

In consideration whereof the said parties of the

second part agree to pay to the said Harry G. King the sum of seven thousand five hundred dollars ($7,500) cash in hand, the receipt whereof is hereby acknowledged, and the further sum of twenty-two thousand five hundred dollars ($22,500) payable on or before the first day of January, 1909; the said Arthur H. Lamborn will also, on or before the first day of January, 1909, execute and deliver to the said Harry G. King his four promissory notes for the sum of twenty-five hundred dollars ($2,500) each, or ten thousand dollars ($10,000) in all, payable the first note on the first day of January, 1910, the second on the first day of January, 1911, the third on the first day of January, 1912, and the fourth and last on the first day of January, 1913. It is also understood and agreed that the said parties hereto, who shall organize and control the said corporation, will cause, as hereinafter provided, the bonds of the said corporation, secured by first mortgage upon the said property, to be executed and delivered to the said Harry G. King, in the further sum of forty thousand dollars ($40,000) making the total amount of money, notes and bonds to be paid for the said property, to be equal to eighty thousand dollars ($80,000). The said notes of Arthur H. Lamborn shall bear interest at the rate of six per cent per annum, payable annually.

The said Harry G. King and the said parties of the second part hereby mutually agree that they will complete the organization of the said corporation as soon as practicable, and not later than the first day of January, 1909. The said corporation shall be or-

ganized for the sum of two hundred thousand dollars ($200,000) divided into two thousand shares of the par value of one hundred dollars each; that the said stock shall be subscribed for by the said parties as follows: the said Harry G. King, five hundred shares; the said John G. Richards, five hundred shares, and the said Arthur H. Lamborn, one thousand shares, and upon the completion of the organization of the said corporation, the said corporation shall, in part payment for the transfer to it of the said property, execute to the said parties its bonds, secured by first mortgage upon the said property, in the sum of eighty thousand dollars ($80,000) which shall be issued to the said Harry G. King as aforesaid, in the sum of forty thousand dollars ($40,000) to the said John G. Richards in the sum of seven thousand five hundred dollars ($7,500) and to the said Arthur H. Lamborn in the sum of thirty-two thousand five hundred ($32,500) the said bonds to draw interest at the rate of six per cent per annum, payable semi-annually, and to run for the term of twenty years.

The said Harry G. King agrees to attend personally to the details of the completion of the organization of the said corporation, which shall be completed as aforesaid, on or before the first day of January, 1909, and in case the said parties of the second part shall fail to pay to the said Harry G. King, on or before the first day of January, 1909, the said sum of twenty-two thousand five hundred dollars ($22,500) then this agreement shall become null and void and the said sum of seven thousand

five hundred dollars ($7,500) paid at the date hereof, shall become forfeited to the said parties of the first part.

It is mutually understood and agreed by the parties hereto that this agreement shall run to and bind the heirs, executors and administrators of each and every of the said parties; and it is further mutually understood and agreed that in case of the death of either of the said parties of the second part, if the survivor shall be unable, in a financial way, to carry out and complete this agreement on behalf of such deceased party, such survivor shall be permitted to carry out and complete the terms hereof for his proportionate interest in the said property as fixed and determined by the terms and conditions of this agreement.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals this 30th day of July, 1908.

HARRY G. KING.	(L. S.)
MARIA J. KING.	(L. S.)
ARTHUR H. LAMBORN.	(L. S.)
J. G. RICHARDS.	(L. S.)

State of Idaho,
County of Lemhi,—ss.

On this 30th day of July, 1908, before me the subscriber, a Notary Public in and for the County of Lemhi, State of Idaho, personally appeared Harry G. King, Maria J. King, Arthur H. Lamborn and John G. Richards, known to me to be the persons whose names are subscribed to the within instru-

ment, and they each acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JOHN C. SINCLAIR,
Notary Public in and for Lemhi County, Idaho.
My commission expires February 1st, 1911.

Plaintiffs' Exhibit "I."

The First National Bank
of Salmon,

Salmon, Idaho, January 1st, 1909.

Received of J. G. Richards 3 notes of $2500.00 each in lieu of payment due on payment of his proportion of purchase money on coal mine, on payment of said note, I agree to turn over to said J. G. Richards, $22,500.00 1st mortgage bonds of the Idaho Coal & Land Co.

H. G. KING.

Plaintiffs' Exhibit "J."

THE IDAHO COAL & LAND COMPANY
Coal Mines at Salmon, Idaho.

Salmon, Idaho, 3/5—1909.

Mr. A. H. Lamborn,
New York City, New York.

My dear Arthur:—

This morning I had a talk with Mr. O'Brien the next best lawyer here in regard to recovering dam-

ages on false statements. I took as an hypothesis a reservoir furnishing water to a town and paralleled the coal mine transaction. From what he gave me it would be foolishness for King to refuse to make good.

I am not certain as to Mr. Cowan's relations with Mr. King. Whether he would prove a valuable advisor for us or would rather incline to favor King. But I shall have a talk with him any way and will then be able to conclude. I shall go over the whole transaction with him first before opening up the tonnage business for I want to know that everything is in proper shape and that we have made good so far as we are concerned.

There is yet another point I want to have cinched before we start anything and that is in reference to the distribution of the bonds when they are issued. I secured an agreement from King in regard to the bonds that will work to our mutual benefit quite materially if I succeed with it, and I don't see how it will fail now. I can go more into detail after I discuss the matter with Cowan. But I expect and draw $22,500 in bonds our way. From what O'Brien said we can force King to put up a bond to pay the interest on the bonds ($80,000).

Will keep you posted by letters and wire.

Sincerely yours,

DICK.

Plaintiffs' Exhibit "L."

THE FIRST NATIONAL BANK
of Salmon,
Salmon, Idaho, Oct. 27, 1908.

Friend Lamborn,

Enclosed find map of new R. R. which is now in course of construction.

If Taft is elected I think there will be quite a stir in R. R. building and I don't see any obstacle against us getting the Iron Horse in the near future.

The coal orders are keeping a double shift busy and the hauler is putting in overtime. It was Dick's idea to keep pushing the new tunnels which makes it expensive working against a solid face and keeps them busy getting out enough coal to fill orders, but as he says it is developing the mine and demonstrating the coal measures which seem to improve right along. It is quite a sight now to go in that big tunnel for over 600 feet and see nothing but coal on both sides. When we get 750 feet in, it is Dick's idea to begin open up rooms so as to get out the coal easily and quicker.

Business is very good, deposits increasing with a big demand for money which helps to make the dividend.

Constance is visiting with the Shoup girls in Boise where the state fair is the feature.

With kind regards and best wishes,

I am, Yours very truly,

H. G. KING.

Plaintiffs' Exhibit "M."

THE FIRST NATIONAL BANK
OF SALMON,

Salmon, Idaho, Nov. 27, 1908.

A. H. Lamborn,
N. Y. City.

Dear Sir & Friend:—

Replying to your favor I beg to say you can deposit the $17,500.00 to the credit of First National Bk. of Salmon with the Hanover National Bk. New York City, taking their receipt for same and they will advise this bank.

I wish to say that if you would prefer to discount your notes of $10,000.00 I will be willing to allow you a $500.00 discount.

Regarding the issue of bonds, Dick tells me he has written you fully, perhaps he did not mention the fact, but as I am still interested in the mine and being President of this Bank it might reflect on me being interested in a bond issue of so large an amount, for I could not go around and explain to everyone that $120,000.00 were Treasury bonds.

Dick will write you an answer in regard to selling price of coal, really it is worth $3.00 per ton more than last year owing to the wonderful improvement in quality. Yet I figure that our main objective this year was to build up a larger business; get the good will of the community, get them all to put in coal stoves, then next year we can make the mine a good dividen*t* payer on local demand by increasing the price which I know the people would pay readily.

We are getting new customers every day, are still behind in our orders.

Yours very truly,

H. G. KING.

Plaintiffs' Exhibit "N."

THE FIRST NATIONAL BANK

Of Salmon,

Salmon, Idaho, Nov. 7, 08.

A. H. Lamborn,

New York City.

Dear Sir & Friend:—

Enclosed find clipping.

We did not advance our price this season as it might have given a great amount of dissatisfaction, but it is surprising how every consumer is praising the quality and it really is 50% better than I furnished last year. Dick has been away but I expect him home next week. The mine is looking fine with plenty of coal and good quality and the new entry has developed a lower measure of coal of 6 feet which I did not have in sight before.

Am in hopes our R. R. prospects will brighten since the election of "Taft." With kind regards, I am,

Yours sincerely,

H. G. KING.

Plaintiffs' Exhibit "O."

THE FIRST NATIONAL BANK
of Salmon,

Salmon, Idaho, Dec. 2, 08.

Friend Lamborn:

Just a line to say that a subscription was started here last week to see what could be done towards getting an electric road in from Idaho Falls and in a week $57,500.00 is signed up by good reliable persons. If McCutcheon wanted a boost for his road and could begin throwing dirt next spring, I fully believe this list could be turned over to him. Now you try and get in touch with him at once, find out if such a thing would help him out, and let me know as soon as possible, if necessary you can wire me. I want a steam road but if we can get any kind of transportation in here it would increase our population to 5000 in 12 months and this would make our local demand for coal a Bonanza. I tell Dick he must get in and dig coal as today I find out from our hauler we are *21* orders *behind* and he is making 3 trips a day now steady.

Yours very truly,

H. G. KING.

[Examiner's Certificate to Exhibits.]

United States of America, for the
District of Idaho,
Southern Division.

I, Daniel Hamer, do hereby certify that the attached exhibits are Plaintiffs' Exhibits "E," "F," "G," "H," "I," "J," "L," "M," "N," and "O,"

offered in evidence before me as Special Examiner in the case of Arthur H. Lamborn and John G. Richards, Plaintiffs, vs. Harry G. King and Maria J. King, his wife, Defendants, in the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

In testimony whereof, I have hereunto set my hand, at Pocatello, Idaho, this 10th day of February, 1910.

DANIEL HAMER,
Special Examiner.

Filed March 1, 1910. A. L. Richardson, Clerk.

Defendants' Exhibit "1"—On Cross-examination.

Box 341.
Golden, Colo. 12/26–'07.

Dear Mr. King:

Am in receipt of your registered today and am sorry to say that I have received no letter from you carrying any obligation or otherwise acknowledging receipt of my letter to you in Nov. There is not another Richards here so it could hardly have gone astray by someone else getting it. The miscarriage must have occurred between Salmon and here. I will leave it to your suggestion how best to correct this accident.

In regard to the deal on the coal mine, I have this to say: I am going to do some business through the agency of a young Washington, D. C. student and I will be able I think to turn the coal mine or any other property of merit to a good advantage to both

you and myself. The plan I prefer to work on is first to sell a ½ interest and then in about a year to sell to the same people the other ½ and do it at a nice figure. The object is to first get them interested and to do it as gently as possible after that we can go after the big money. To outline this plan in a general way would be this: I must have $12,500 from this sale of the ½ interest to be paid pro rata. The ½ is to be sold on a basis of $75,000 for the whole or $37,500 for the ½. I would want the deal to start about July with a payment of about $8,000 or $10,000 and the balance to be made in payments extending over a period of 18 mos. or two years with all the net returns to apply on the payments. If we can show them 6% on their investment we can turn the other ½ loose at 75 or maybe 100 thousand, and besides this, if we can talk R. R. too, they will be the keener to have it all. A deal on this plan means $25,000 to you for a ½ interest and you still retain a ½ interest from which we would expect to make the big money after we will have been able to prove to them they have a live property.

I would prefer to meet you some place and talk this over if the plan is suitable. If the general plan sounds good, let me know at once as I can go on making my medicine. Write at once for I leave here in a couple of weeks.

As ever,

DICK.

Defendants' Exhibit "2"—On Cross-examination.

Denver, Colo. 1/10, 1908.

Mr. H. G. King,
Salmon, Idaho.

Dear Friend: I just came in from Victor where I have been for a week. I found your letter and was glad you are favorable to the plan of making a turn on the coal mine. I am sure that we will make the other half more than worth while if we can show them the first half is all right.

Although I didn't know at the time when I was in Victor that your letter had come, I talked the matter over with a friend of mine up there and he was very enthusiastic and wanted me to give him a chance to meet the payments, etc. But I prefer to handle it in the east as it would give us the better chance to make the big money when the second shouting comes.

I shall leave here about the 20th for the south, going by way of Arizona to Texas to the ranch. In the meantime, I shall have the wires working to perfect the plans by which we will secure the dough. As soon as we know how the money is to come I shall meet you some where and we will close up the deal. In the meantime I want you to send me all the data that would be of assistance. The reports of Bell. The probab*ly* tonnage in sight and the thickness of the vein. Cost of mining after development, cost of developing, that is, of driving drifts and cross cuts. Tell me what the local consumption must be, and what kind of coal it is called. I wouldn't care for

the analysis unless it should be one that you have had made since you became the owner.

The recent scare in the stock market has had the effect of making money sort of timed bub, maybe we can coax it up to let us put our hand on it regardless of its timerity. However, I will be able to say more about that in a month or two.

I have been able to learn nothing as to the whereabouts of that letter with the papers of time. Am not worrying about that because if they have fallen into unscrupulous hands, I know it will profit them nothing. I have since writing to you learned that a Richards gets his mail at some club here and that he had gone east to return about now. Will look him up if he gets back before I go away.

Write me at 1215 East 5th, Winfield, Kansas.

Very truly,

DICK.

Defendants' Exhibit "3"—On Cross-examination.

Denver, Colo. 1/23–1908.

Dear King:—

I was sure I would leave several days ago, but am getting away this P. M. Will get to the ranch in a week or ten days. That will be my *permanent* address for a couple of months when I expect to be due in the seat of our national politics—Washington. Am not going up to interest them in any new phase of politics but in *coal*. Mr. H. G. King's only coal mine in the State of Idaho.

Now I am working on the plan of getting at least $20,000 the first year. Am offering ½ interest and

supposed to be taking care of the other half with you. Of course I must be supposed to be putting in some money myself.

My friend with whom I am working here may want to go up and look the property over, in case he does conclude to go we will go up his spring vacation which occurs sometime about the last of March.

If we can make good on the first half we can sell the other ½ for all the whole thing is really worth. It is at the second spasm that I expect to see the big shouting.

In regard to the lost letter it seems to be lost yet. There is no clue to the thing at this end. I will want the money about March 1st. If the other note don't turn up by that time you can send a duplicate and maybe we can make things alright that way.

We will aim to get together some where whenever things begin to look like business. Will write you whenever there is any developments. In the meantime, I hope you are coming well to the good as a coal dealer. Be sure to send me those reports of Bells.

Very truly,

J. G. RICHARDS.

Higgins, Texas.

Defendants' Exhibit "5"—On Cross-examination.

Winfield, Kans. 3/12/08.

Mr. H. G. King,

Salmon, Idaho.

Dear King: I came up here a few days ago on account of father's illness. At first it seemed as though he was to be pretty sick, but he is again alright.

Am leaving tonight for Higgins where I go to close up a little land deal and will then be ready to "hit the hike."

Will send you agreements to sign and send me one. Of course I am selling only a onehalf but I desire to *represent* that I am investing some too so that a contract for the whole is necessary.

Here's hopin that everybody is well and happy.

As ever,

DICK.

Higgins, Texas.

Defendants' Exhibit "6"—On Cross-examination.

"PARK AVENUE HOTEL"

New York, 6/13–1908.

Dear King:

Am in here and talking to the right people and have them interested. Now if I can carry them through we will not only do business now but can keep on doing business with the other properties that may lie adjacent. I am trying on a basis of $40,000 for the ½ interest representing that I am buying the ¼th which we can fix up alright between us.

I could have done business in Washington but that would have been the end of it, there could have been nothing following for there would have been no more money and so great was my faith in my people here that I took the chance to make good after I got here. I was a week slow however but then it was hard to make the stab at the exact date. But then that cuts no ice, I expect to make good although I may be a few weeks late with closing a deal. The money that I

expected to get went in a Mexican deal and was $30,000 cold cash to begin with. I know all about the property. But that did not take all the money there is on Wall St.

I am being treated properly—they say my money has holes etc., and I am having a continual round of pleasure.

As ever,

DICK.

Defendants' Exhibit "7"—On Cross-examination.

New York, 6–19–08.

H. G. King,

Salmon, Ida.

Will you accept for three fourth interests seventy five hundred upon signing contract, option to be extended until Aug. first, to permit instruction seventy five hundred January first next, seventy five hundred July first nineteen nine, seventy five hundred Jan. first nineteen ten, balance amounting thirty thousand paid you from profits operation with interests six per cent, you retain one fourth interest, wire answer, write fully immediately extent present development, all gossip regarding railroad, care of A. P. Lambern Co. one hundred six, Wall St.

J. G. RICHARDS.

(Paid)

Defendants' Exhibit "8"—On Cross-examination.

New York, 6/20/08.

H. G. King,

Salmon, Ida.

To answer long telegram say—impossible to accept terms, wish you could come on here.

J. G. RICHARDS.

(Paid)

Defendants' Exhibit "10"—On Cross-examination.

F. S. Wright. 3180# $5.58

STATEMENT TO IDAHO COAL & LAND CO. COAL HANDLED BY THE SALMON LUMBER CO., LTD.,

FROM

Oct. 1, 1909, to Jan. 1, 1910, inclusive, together with orders now on our books waiting to be filled.

From Oct. 1st to Oct. 9th:

Whitcomb & O'Brien,	1800#	$6.30
J. R. Wheeler,	2090#	7.30
Walter Shoup,	2820#	9.87
Golden Rule Store,	1825#	6.40
G. B. Crippen,	1825#	6.30
J. B. Mason,	1710#	5.98
Pioneer Merc. Co.,	2400#	8.40
Chas. Black,	1850#	6.47
H. G. King,	2350#	8.72
Bert Quarles,	1850#	6.50
Geo. H. Monk,	1800#	6.30

Geo. W. Kingsbury,	3500#	$12.25
W. B. Horn,	3400#	11.90
School Board,	4960#	17.36
W. M. Hines,	2400#	8.40
A. M. Bradshaw,	4660#	16.30
F. W. Carl,	1400#	4.90
Mrs. A. B. McCaleb,	2000#	7.00
Carl Wolfe,	2000#	7.00
Oct. 9, 1909.		
F. S. Wright,	3180#	*5.58-11.13*
Mrs. Pugh,	1680#	5.58
Oct. 11, 1909.		
Geo. Beach,	1650#	5.80
E. J. Phelps,	1800#	6.30
M. M. McPherson,	4500#	15.00
Oct. 13th.		
Whitcomb & O'Brien,	2250#	7.90
Chas. Black,	1330#	4.65
Oct. 15th.		
Roy Herndon,	2530#	8.85
Horace Pope,	2170#	7.60
E. B. Mitchell,	2450#	8.60
Ed. Williams,	2170#	7.60
Jack Walters,	3340#	11.69
Chas. Beers,	940#	3.30
Lemhi Valley Merc. Co.,	2000#	7.00
Anton Christiansen,	2270#	7.95
Oct. 16th.		
W. C. Smith,	3620#	12.65
Geo. Steel,	2530#	8.85
Bert Quarles,	2260#	7.90

Oct. 18th.		
Chas. Black,	2600#	$9.10
Wm. O'Connell,	1440#	5.04
Oct. 20th.		
Dave Marsh,	2610#	9.14
John Kadletz,	1520#	5.32
Ross White,	4750#	16.62
Oct. 22nd.		
H. G. King,	2250#	7.87
H. F. Kimball,	4820#	16.87
Wm. Shoup,	2460#	8.61
Oct. 23rd.		
Rudolph Wright,	3700#	12.95
A. W. Pattison,	5050#	17.68
Bert Quarles,	4430#	15.50
John McKinney,	4570#	16.00
Ida. Land & Investment Co.,	5510#	19.28
Oct. 27th.		
G. H. Monk & Co.,	6050#	21.15
Will Shoup,	2780#	9.73
F. W. Carl,	2570#	9.00
Oct. 28th.		
S. E. Yaggy,	2500#	8.75
Thos. K. Andrews,	5730#	20.00
H. G. King,	2400#	8.40
Mrs. M. M. Shenon,	4430#	15.50
Mrs. Doty,	250#	.90
Chas. Black,	2500#	8.75
Geo. Bryant,	2800#	9.80
A. A. Smith,	4700#	16.35
Walter Gray,	2480#	8.68
John Lambert,	2720#	9.52

Nov. 1st.		
H. F. Kimball,	2130#	$7.45
F. C. Miller,	2470#	8.65
Nov. 2nd.		
John Kadletz,	3190#	11.16
John Manfull,	2260#	6.78
Geo. Wilson,	3030#	7.10
Nov. 3rd.		
J. H. McPherson,	2000#	5.00
Jas. Light,	2380#	8.35
Nov. 4th.		
E. S. Edwards,	4000#	14.00
W. J. Morgan,	2360#	8.75
Frank Williams,	2040#	7.14
Nov. 6th.		
Chas. Black,	4670#	16.35
Pete McKinney,	2000#	6.00
Mary S. Wood,	2460#	8.60
Mrs. John Reese,	2040#	7.15
Mrs. Pugh,	2370#	8.30
All Mathews,	2130#	7.45
Nov. 8th.		
F. M. Pollard,	4500#	15.75
Dave Sandiland,	4680#	16.38
Nov. 9th.		
G. W. Kingsbury,	4600#	16.10
Palace Restaurant,	4700#	16.45
G. W. Benjamin, Jr.,	2570#	8.49
Nov. 10th.		
Ed. Kuney,	4750#	16.62
Wm. O'Connell,	5200#	18.20
1st Nat. Bank,	2740#	9.50

I. N. Overturf,	2230#	$7.80
F. C. Miller,	4800#	16.80
Nov. 11th.		
Mrs. Chaffee,	2000#	7.00
Pioneer Merc. Co.,	2600#	8.75
Pioneer Merc. Co.,	4740#	16.59
Wm. Anderson,	5380#	18.85
Geo. Hudlow,	2670#	9.35
R. R. Abraham,	1540#	5.40
Nov. 12th.		
Golden Rule Store,	5340#	18.70
C. Van Straat,	5400#	18.90
1st Nat. Bank,	4360#	15.25
H. G. King,	4460#	15.61
Schoolhouse,	5510#	19.30
Nov. 16th.		
Whitcomb & O'Brien,	5050#	17.70
Chas. Black,	5110#	17.91
Mrs. Weese,	5050#	17.70
Nov. 16th.		
A. E. Murphy,	2500#	8.75
H. S. Richardson,	2700#	9.45
F. L. Plummer,	2970#	10.39
Dan O'Connell,	2230#	7.80
E. Haug,	2570#	9.00
Nov. 17th.		
W. S. Andrews,	5350#	18.70
F. A. Preston,	5200#	18.20
Geo. Beach,	2600#	7.80
John Lottridge,	2530#	8.85
Nov. 18th.		
John McKinney,	5070#	17.74

Nov. 20th.		
Schoolhouse,	5050#	$17.67
Pioneer Merc. Co.,	5300#	18.55
Dan O'Connell,	2230#	7.80
A. H. Ford,	4000#	14.00
Nov. 22nd.		
H. F. Kimball,	4500#	15.75
Dave Marsh,	4660#	16.30
Mrs. Igou,	2720#	9.52
Tim Willis,	2870#	10.05
Nov. 23rd.		
A. Amonson,	3100#	10.85
H. G. King	2000#	7.00
Mrs. Church,	2000#	7.00
Nov. 27th.		
Geo. Ashton,	3030#	10.60
John R. Wheeler	1000#	3.50
Dave Marsh,	5200#	18.20
Russ White,	5200#	18.20
Ed. Selander,	2000#	7.00
R. R. Alexander,	2000#	7.00
Jas. DeAtley,	1420#	4.25
G. A. Murphy,	2690#	8.05
Nov. 29th.		
Mrs. Radford,	4000#	14.00
A. A. Smith,	2650#	9.25
Frank Armstrong,	1600#	5.60
Nov. 30th.		
J. A. Frey,	1000#	3.50
T. J. Atkins,	4330#	15.15
R. S. Smith,	1000#	3.50
C. D. Slaughter,	3300#	8.25

Jas. M. Ryan,	3200#	$11.20
Dec. 2nd.		
Salmon Lumber Co.,	1770#	4.43
E. K. Abbott,	4400#	15.40
John Kadletz,	2770#	9.70
Geo. Smith,	3300#	11.55
T. J. Ostrander,	1000#	3.50
Wm. Kadletz,	2700#	9.45
G. W. Noble,	1600#	5.60
Dec. 3rd.		
Chas. Black,	4520#	16.80
Chas. Beers,	2150#	7.52
Chris Van Straat,	2650#	8.57
A. C. Cherry,	2550#	8.90
Barbara McNicholl,	2000#	7.00
Frank Pattison,	1910#	5.75
Fred Carl,	2000#	7.00
Sam Young,	2600#	9.10
Episcopal Church,	3000#	10.50
Wm. Anderson,	4700#	16.45
E. T. Andrews,	2170#	7.60
G. W. Kingsbury,	4700#	16.45
R. R. Abraham,	2190#	7.65
Frank Williams,	2000#	7.00
Frank Tingley,	2580#	9.05
Al. Smith,	2410#	9.45
J. M. Stewart,	1900#	6.65
Stewart & Sandel,	3100#	10.85
Dec. 7th.		
Dick Nafus,	4680#	11.70
John Lottridge,	3000#	10.50

Dec. 8th.		
C. H. Davenport,	2000#	$7.00
J. D. Black,	2710#	9.50
Palace Restaurant,	4860#	17.00
Dec. 9th.		
Ludwick Mogg,	4850#	17.00
Jas. Mafaffey,	3500#	12.25
H. G. King,	2840#	7.10
G. H. Perry,	3530#	8.35
W. H. Andrews,	2330#	8.35
Kadletz Bros.,	2370#	8.30
Mrs. Simers,	1500#	3.75
Mrs. Olds,	2140#	7.50
Anton Christiansen,	2660#	9.31
Dec. 10th.		
Mrs. Doty,	2653#	9.30
Dec. 11th.		
Dr. Hamner,	2000#	7.00
Allen Bradshaw,	3000#	10.50
Len Cummings,	2520#	8.80
Ervy LaMunion,	2480#	8.70
Dr. Geo. Kinney,	5000#	17.50
Schoolhouse,	5080#	17.80
Dec. 13th.		
Lumber Co.,	3540#	8.85
J. C. Manfull,	1040#	3.10
W. A. Warner,	2810#	8.45
E. K. Abbott,	1460#	5.10
Dec. 14th.		
Wm. Shoup,	5000#	17.50
Schoolhouse,	4000#	14.00
Frank Rittenhouse,	1000#	3.50

E. L. Hubbard,	5030#	$17.60
Dec. 15th.		
Geo. Hudlow,	2000#	7.00
Frank Armstrong,	2200#	7.70
W. B. Pyeatt,	2500#	8.75
Jas. DeAtley,	1500#	4.50
Dec. 16th.		
Al. Wertman,	1000#	3.50
Lemhi Merc. Co.,	4000#	14.00
Dec. 17th.		
Dave Sandiland,	1000#	3.50
Geo. Wilson,	3500#	12.25
Dec. 18th.		
H. G. King,	2420#	8.50
Shenon Hotel,	2140#	7.50
Mrs. John Reese,	5000#	17.50
Dec. 20th.		
Dan O'Connell,	2540#	8.90
Joe Hod,	2500#	8.75
Chas. Black,	4510#	15.28
Dec. 21st.		
G. A. Murphy,	2250#	7.87
Goe Wicklund,	2500#	8.75
Geo. Noble,	2500#	8.75
Dec. 22nd.		
C. D. Slaughter,	2500#	6.25
R. R. Alexander,	2500#	8.75
Russ White,	4520#	15.80
Dec 24th.		
Tim Willis,	2770#	9.70
John Lottridge,	3500#	12.25
Mary S. Wood,	2750#	9.60

Dave Marsh,	5420#	$18.97
Dec. 27th.		
Mrs. Igou,	2650#	9.25
G. W. Kingsbury,	2850#	9.95
Mrs. Al. Matthews,	3500#	12.25
R. R. Abraham,	2650#	9.25
A. H. Ford,	2850#	9.95
Dec. 28th.		
William Anderson,	5500#	19.25
H. G. King,	3500#	8.75
G. W. Snyder,	4500#	15.75
J. B. Mason,	5500#	19.25
Dec. 29th.		
John Kadletz,	3500#	12.25
Shenon Hotel,	5500#	19.25
G. B. Crippen,	2000#	5.00
Harry Driscoll,	2110#	7.40
Rev. McPherson,	2890#	10.10
Chas. Snooks,	5520#	19.30
Dec. 30th.		
Mrs. Ball,	2000#	7.00
Schoolhouse,	5550#	19.40
Frank Hall,	3500#	12.25
Dr. Kimball,	3500#	12.25
F. A. Preston,	5550#	19.40
J. P. Maxfield,	3500#	12.25
Frank Patterson,	5600#	19.60
Dec. 31st.		
Pioneer Merc. Co.,	5330#	18.65
L. A. Spooner,	4600#	16.10
Wm. O'Connell,	3570#	12.25
Rev. G. H. Perry,	3500#	8.75

From Jan. 1, 1910, to Jan. 7th, inclusive:

Jan. 3rd.		
Russ White,	5170#	$18.10
W. C. Smith,	3525#	12.35
1st Nat. Bank,	5000#	17.50
P. J. Phelps,	3400#	11.90
Jan. 4, 1910.		
Schoolhouse,	3000#	10.50
Sterling Price,	2250#	7.85
A. Amonson,	4000#	14.00
Rev. Yaggy,	2350#	8.20
Jan. 5, 1910.		
Salmon Lumber Co.,	1250#	3.12
Mrs. Brewer,	1000#	3.50
F. M. Pollard,	4500#	15.75
Harry White,	2250#	7.85
H. G. King,	3600#	9.00
H. F. Kimball,	3500#	12.25
P. D. Spellman,	2500#	8.75
Ed. Selander,	2340#	8.20
Jan. 7th, 1910.		
A. H. Ford,	3000#	10.50
John Lottridge,	1750#	4.37
J. D. Black,	2100#	7.35
Chas. Black,	2300#	8.05
Geo. Hudlow,	3400#	11.90
Walter Gray,	3070#	10.75
Dave Marsh,	1750#	6.15
Jas. Light,	2400#	8.40
Schoolhouse,	4850#	16.80
F. C. Miller,	3500#	8.75
Geo. Bryant,	2200#	7.70

Orders on the books of the Salmon Lumber Co., Ltd., not filled as yet:

E. K. Abbott,	30,000#
Schoolhouse,	40,000#
Shenon Hotel,	4,000#
Mrs. Yearian,	4,000#
Dr. Wright,	4,000#
Palace Restaurant,	4,000#
Mrs. Van Skriver,	2,000#
Dr. Hamner,	2,000#
A. C. Cherry,	4,000#
John Macracken,	2,000#
Mrs. Wood,	2,000#
E. Haug,	2,000#
Lemhi Valley Merc. Co.,	4,000#
Ed. Bruce,	2,000#
G. W. Noble,	4,000#
Mrs. Prestige,	2,000#
Frank Williams,	2,000#
Allen Bradshaw,	4,000#
City Jail,	4,000#
W. B. Pyeatt,	4,000#
Wm. Anderson,	4,000#
Mrs. Wm. Anderson, House,	4,000#
G. W. Kingsbury,	4,000#
Frank Rittenhouse,	1,000#
J. A. Frey,	1,000#
W. B. Horn,	4,000#
Mrs. E. T. Andrews,	2,000#
Thos. Dixon,	4,000#
C. H. Davonport,	4,000#

G. W. Benjamin, Jr.,	4,000#
E. F. LaMunion,	2,000#

(4,000# designates a load which is a little more than 4,000#. The loads hauled from the mine are not exact weights as ordered.)

(The above does not include the orders from the G. & P. R. R. Co. *Thur* Thos. Dixon, as the coal is not mined in large enough quantities at the present time to supply both the city trade and the railroad company.)

Coal purchased from the Idaho Coal & Land Co. by the G. & P. R. R. Co. *thur* Thos. Dixon. For use on their steam shovels and drag lines:

October	1	18,530#
	14	6,220#
	19	20,000#
	30	6,000#
	30	4,060#
November	2	6,040#
	2	12,000#
	3	10,000#
	5	5,300#
	5	7,550#
December	4	8,100#
	6	4,100#
	9	8,000#
	11	10,000#
	13	6,000#
	13	4,800#
	14	5,240#
	15	10,000#
	16	8,000#

16	4,600#
17	4,000#
17	5,000#
17	3,120#
20	5,000#
20	3,000#
20	4,800#
20	5,020#
20	5,000#
22	5,020#
23	5,150#
23	3,000#
27	5,080#
27	5,030#
31	5,000#
Total,	227,760#

This company has a standing order for 150 tons per month.

State of Idaho,
County of Lemhi.

C. D. Slaughter, being first duly sworn deposes and says on oath that he is the Secretary and Treasurer of the Salmon Lumber Company, Limited, that the foregoing eight pages is a true and correct report of business from the books of said company with reference to the sale and receipts of said company of coal handled by them for the Idaho Coal and Land Co., between the dates of October 1st, 1909, to Jan. 8th, 1910, both dates inclusive. Affiant certifies that

this is a true and correct statement to the best of his knowledge and belief.

C. D. SLAUGHTER.

Subscribed and sworn to before me, this 8th day of January, 1910.

[Seal] FRANK L. PLUMMER,
Notary Public, Lemhi County, Idaho.

Defendants' Exhibit "11"—On Cross-examination.

Nov. 4, 1908.

JJ—185

Mr. John G. Richards,
Salmon, Idaho.

Dear Dick:—

I presume by this time you are enroute or at Salmon but am taking the precaution of sending copy of this to Higgins.

I return Mr. Miller's letter. It is very encouraging. He writes me under date of the 13th that when we sink a plane we will have to put in a pumping plant; but I believe this was anticipated by you.

I believe I told you that Mr. King had advised me in strictest confidence to the effect that Jas. J. Hill's son was back of the Ry. proposition. If this is so it should be a good thing for us. He also writes me under date of the 27th that the Denver, Laramie and Northwestern Ry. is a new company which proposes to build a road from Denver, through St. Anthony via Salmon to Seattle. This would make two roads and if it proves correct between the two we should be able to get a good outlet. Please bear in mind that in all lines of business it is always well to be

located at a point where two roads cross in order to have the competition. I had the pleasure of receiving a very nice letter from Miss Constance, dated Boise, Oct. 17th. The letter is amusing.

If you two mean business you should get together and talk it over carefully and cut out the hot air. I don't believe you could do any better Dick. I would like your version of the three charming girls and a widow who went as far as Denver with you. Also full information regarding Miss Mary Weldon, —a "peach." I should judge from what Miss Constance writes. You are a great pair and I am satisfied it is useless for me to discuss questions of the heart with either of you as between you you will only make a fool of me in the end. I understand a young Mining Engineer has got his ear close to the ground in Miss Constance's location. The next time he comes to Salmon I would advise you to drop him in the river. As you know the current is very fast under the bridge and by the time he woke up he might be 20 miles down the drink.

It is not every mining engineer that owns a quarter interest in a very large coal property. You might put him in Pollard's Opening for a few weeks to cool him off.

Yours very sincerely,

AHL/R
HGK

Defendants' Exhibit "12"—On Cross-examination.

JJ—573 New York, Dec. 4, 1908.

Mr. H. G. King,
Prest. First Natl. Bank,
Salmon, Idaho.

Dear Mr. King:—

As you are aware, we represent through our associates the Meinrath Brok. Co. a great many best refiners. Two of these gentlemen are in N. Y. this week, and one of them who is very *clos* to me is interested in two different coal properties, one at Colo. Springs, a very low grade of lignite, and one at Sheridan, Wyo.

I asked about the question of issuing bonds on our company and he said he felt we would make a serious mistake if we did not issue first mortgage bonds on the property to the extent of $200,000 minimum or possibly $250,000, depending on the amount of machinery and equipment we will have to employ if a railroad comes through.

This gentleman is a man whose judgment I highly respect, is a man of large affairs, has three different beet refineries and has had long experience in the handling of his coal properties, and states we will make a mistake unless we take action in advance. He is also in the banking business in a large way and states he does not believe it could be any reflection on your judgment as a banker should you make this issue on a property which is at present neither in your estimation nor in the estimation of outsiders,

not worth this amount. You could make an explanation to anyone buying these bonds that they are for an amount to cover the actual cost of the property which is the only amount you are offering for sale at this time and that the balance is kept in the Treasury for contingencies.

The gentleman I refer to is Mr. J. R. McKinnie of the McKinnie-Davis Realty Co., Colo. Springs, Colo. Mr. McKinnie was formerly Prest. of the Exchange Bank of Colo. Springs and is now the Vice-Prest. He states he sold $100,000 of his bonds in the Colo. Springs property, a very low grade of lignite coal at par to some English people. It was more or less of an accident as they happened to be in Colo. Springs and he got acquainted with them in that way.

Mr. McKinnie's ideas regarding our selling $80,000 bonds to cover the cost of the property is that we would have to sell it more or less like any piece of real estate. That is, in a personal way. He states in his position as a Banker, you would be able to offer banking friends or connections of your banking friends; that the bonds should be 6% bonds. In his opinion if they were offered either in New York or Chicago you would have to establish a personal interest with these people to take them for sale in the first place, and in the second place could offer them at 87½ or 90 and interest.

The point I want to bring particularly to your attention is the fact as I wrote you some weeks ago, that I believe we will make a mistake in not issuing first mortgage bonds on our property to an amount

that will take us over to at least 1000 tons daily capacity should a railroad come to Salmon as otherwise we would have to retire all of the first issue of $100,000 and then have another new issue which would make it very difficult to explain, or else issue second mortgage bonds which we would have a great deal more trouble in selling.

You must realize when the Railroad comes through we will have to make rapid strides to keep pace with any demand which might come with it. Mr. McKinnie is well acquainted in all Colo. and particularly in Denver. He states the Denver Larimee and N. W. is no myth. That it is backed by men of determination and means. He doesn't know whether it is a connection of the Burlington but states they are really building northwest from Denver at the present time.

Since the little map which you sent me indicated the line was going through Salmon and through the Salmon River Territory and with a terminus at Seattle, Mr. McKinnie and his partner has also confirmed the belief that they are headed in this direction, and believe as I do it is possible it is a Burlington connection.

You realize I appreciate your position as banker and at the same time owner of a quarter interest in the property, and I would not embarrass you, but it is certainly better for you to *go the* trouble of making explanation as to why the bonded indebtedness is so great at present rather than embarrass all of us in two or three years from now by being forced to

retire a lot of these bonds in order to make a larger bond issue at that time.

Please reply to me promptly,

Yours sincerely,

A. H. LAMBORN.

AHL/R.

Defendants' Exhibit "13"—On Cross-examination.

New York, Nov. 19, 1908.

JJ—375.

Mr. H. G. King,

Salmon, Idaho.

Dear Mr. King:—

I beg to acknowledge your letter of the 11th inst. with clippings relative to the trolley road as well as the Denver, Laramee and N. W.

You are aware that the Burlington is now controlled, jointly, by the Northern Pac. and the Gt. Northern. The Burlington has one terminus at Billings, Mont. and the other at Denver. I have no doubt the D. L. & N. W. is really a continuation of the Burlington in Colo. It seems a long cry however from Denver to Seattle. I think it will be a number of years before we see this line through. The word "eventually" sounds hopeful but not very secure.

I think you are in the best position to judge the merit of your action in not advancing the price of coal to $7. per ton in view of the better quality delivered, but as you are aware it was my idea that you maintain the $7. price from the start, and this was what we agreed upon when in Salmon.

If you are advertising in the Salmon papers it seems to me it would be highly proper for you to call the attention of the public to the fact that Boise is paying $8.50 and give quotations also at Butte, Pocatello, and points on the railroad lines, calling special attention to the fact that with railroad facilities the price is so much higher than you are asking that it will be necessary for you to advance the price to $7. per ton later, and in the same ad. call particular attention to the superiority of coal over wood, and the fact that the new company is delivering proper coal and is not trying to take advantage of conditions.

Tell the people frankly that our policy is a liberal one and that we want their confidence and feel we are entitled to it in view of the fact that we have not taken any advantage, nor have we asked nearly as much as the mine operators and railroads. This will tend to make us secure should the railroad come in and try to do any monkey business with us. I am not looking for a lot of glory for our company but I do believe we are entitled to it, and also feel in view of the high cost of developing our property and the high cost of hauling from the mine, that we are entitled to the $7. per ton and believe if you would make the announcement that on and after Dec. 15th you will be forced to charge $7 per ton and call attention to the fact that this is still $1.50 under the present price at Railroad points, it would be a good idea. In other words, it is my idea that the ad. should bring out; First, that the coal is superior, that the management is conservative, that we seek their con-

fidence, that our price is at present much below prices at points on the R. R., and lastly, that the expense of mining and developing forces us to advance the price to $7 per ton on Dec. 15th.

Now in regard to the bonds: As I understand it you are going to take up with Dick the question of making the bond issue not less than $200,000 or even $250,000, and issue at the present time $80,000 to cover the cost of the property. Please make it clear to Dick that by issuing $200,000 or $250,000 of your bonds that it only tends to make our stock all the more secure in the event of a very largely increased tonnage in years to come, as we will then be able to sell these Treasury bonds without the issuing of a second mortgage and we can still leave our stock capitalization on the same basis as at present, so that the stock if we were on a large working basis would be most highly profitable and the bonds would earn the money for the stockholders, who would be you, Dick and myself.

I have arranged to pay you the $17,500 due Jany. 1st and will thank you to advise me how you would like this payment made. I want to go over our papers again within the next ten days and will write you further regarding the $10,000 notes which are to be paid $2500. per annum commencing Jany. 1st, 1910, 1911, 1912, 1913.

I have not heard from Dick for the past ten days but suppose he must be in Salmon by this time and I am sending him herewith copy of this letter.

Are there any kicks whatever regarding the coal, or is everyone entirely satisfied? I think Dick

should spend a good deal of his time immediately upon his return in getting the card index up, as well as getting in line, houses that are not using coal. You live in a small community, you and Dick are both popular, and you can without your friends knowing it, get them to advertise the coal.

In getting up the ad. in the newspaper I think you should make it as effective as possible, conservative but firm, nothing startling, but so that the people will realize that we are business men and not hogs.

Now, in regard to selling the bonds in New York: I think you are mistaken regarding the ease with which they can be sold. These bond houses in New York city do not like to take up an industrial bond unless they get a wad of the common stock with it. You as a banker, however, should be able to sell these bonds in the west, and if you know of anyone in Seattle, Portland, Denver, Butte or Salt Lake who can handle the entire bond issue, take it up with them. Of course, we don't want to sell one bond unless we sell the whole 80. It would not be fair to any one of us that his bond should be sold ahead of the others. It would be fair if 20 bonds were sold that the proceeds should be divided pro rata to our holdings.

I suppose Miss Constance is home by this time. Kindly give her, as well as Alice, my kind regards, and also remember me to your wife and give my love to the little children.

Believe me,

Very sincerely yours,

AHL/R A. H. LAMBORN.

JGR

Defendants' Exhibit "14"—On Cross-examination.

New York, Oct. 7, 1908.

GG—740.

Mr. H. G. King,
Prest. First Natl. Bank,
Salmon, Idaho.

My dear Mr. King:—

I acknowledge with pleasure your esteemed letter of the 1st inst. Please note copy of letter I am writing Dick.

Will it be too much to ask you to ask Mr. Miller to write me stating just exactly the character of this coal, and whether it is running in a clean vein or whether the sandstone still shows. Also what you mean by "Hard coal."

Dick, as I understand it, is of the opinion that when we get down on a plane of say 1000 or 2000 feet that we will get good bituminous coal.

With kind regards to your family, believe me,

Sincerely your friend,

A. H. LAMBORN.

AHL/R.

[Examiner's Certificate to Defendants' Exhibits.]

United States of America, for the
District of Idaho,
Southern Division.

I, Daniel Hamer, do hereby certify that the attached exhibits are Defendants' Exhibits 1, 2, 3, 5, 6, 7, 8, 10, 11, 12, 13 and 14, offered in evidence before me as Special Examiner in the case of Arthur H. Lamborn and John G. Richards, Plaintiffs, vs. Harry

G. King and Maria J. King, his wife, Defendants, in the Circuit Court of the United States of America, in and for the District of Idaho, Southern Division.

In Testimony Whereof, I have hereunto set my hand, at Pocatello, Idaho, this 10th day of February, 1910.

DANIEL HAMER,
Special Examiner.

Filed March 1, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Opinion [Filed October 10, 1910].

October 10, 1910.

DIETRICH, District Judge:

The defendants move for an order fixing the amount of the Supersedeas Bond herein. The decree from which they contemplate taking an appeal to the Circuit Court of Appeals requires the defendant Harry G. King to pay to the plaintiffs various sums aggregating $22,800.00, and also requires the defendants to deliver up for cancellation a certain contract of sale and certain promissory notes executed by the plaintiffs in favor of the defendants.

It is further adjudged that the plaintiffs recover their costs, taxed at $403.35. The question arises upon the application of Rule 13 of the Circuit Court of Appeals of the Ninth Circuit, which substantially corresponds to Rule 29 of the Supreme Court, and is as follows:

"Supersedeas bonds in the Circuit and District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal."

The record discloses the fact that at about the time this suit was commenced, for the purpose of acquiring security for the payment of any judgment which they might recover, the plaintiffs caused certain property of the defendants to be attached, in-

cluding the land out of the sale of which the controversy herein involved arose, and also some other real property and certain bank stock belonging to the defendant Harry G. King. The lien of this attachment is now in force. It is conceded by both sides that the application of the rule is not clear, and I have not been able to get very much assistance from the decided cases. Perhaps some light may be found in *Louisville etc. Railway Co. vs. Pope* (Eighth C. C. A.), 74 Fed. 1, and *Fuller vs. Aylesworth* (Sixth C. C. A.), 75 Fed. 694. While the question is not at all free from doubt, upon consideration I have concluded to regard the decree as not being one "for the recovery of money not otherwise secured," and the amount of the bond will be fixed at $5,000.00, which, in view of all of the circumstances and contingencies, it is thought will not be unnecessarily onerous to the defendants and at the same time will afford reasonable protection to the plaintiffs against the injury and peril attendant upon the delay in enforcing their decree.

[Endorsed]: Filed Oct. 10, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Respondents.

Assignment of Errors.

Come now the respondents and file the following assignment of errors upon which they, and each of them, will rely upon their appeal from the decree made by this Honorable Court on the 29th day of August, 1910, in the above-entitled cause:

I.

That said decree is erroneous wherein it adjudged the cancellation of the contract of sale and notes referred to and set forth in the bill of complaint herein, and in restraining and enjoining the respondents from setting up or claiming any rights under said contract and notes; the said decree in this respect being necessarily based upon the conclusion that respondents induced and procured the execution and delivery of said contract and notes by their false and fraudulent conduct and representations, when as a matter of fact such conclusion is not sustained or supported by the evidence.

II.

That said decree is erroneous wherein it holds the

respondent, Harry G. King, liable for, and wherein it requires said respondent to pay to the complainants the money heretofore paid by complainants on account of the contract set forth in the bill of complaint, to wit: $6,000.00 paid July 20, 1908, and $15,000 paid on January 1, 1909, with interest thereon from June 8, 1909, at the rate of seven per cent per annum, making a total aggregate of $22,800.00; said decree in this respect being necessarily based upon the conclusion that said payments were induced and made by reason of the false and fraudulent representations and conduct of the *of the* respondents, when in fact such conclusion is not sustained or supported by the evidence.

III.

That said decree is erroneous wherein it adjudges that the respondents Harry G. King and Maria J. King surrender and deliver up for cancellation the said contract of sale and notes described in said decree; said decree in this respect being based upon the conclusion that respondents induced and procured the execution and delivery of said contracts and notes by false and fraudulent representations and conduct, when in fact such conclusion is not sustained or supported by the evidence.

IV.

The bill of complaint and evidence shows that the complainants Arthur H. Lamborn and John G. Richards were jointly interested and acted jointly as parties to the contract of sale set forth in the bill of complaint, and in all matters growing out of or relating to said contract; the evidence further

shows that complainant, John G. Richards, did not come into equity with clean hands, but was guilty of such conduct as to estop him from claiming or obtaining any relief in equity; the decree entered herein is therefore erroneous wherein it adjudges relief to complainants, one of whom is not entitled to recognition in a court of equity.

V.

That the decree is erroneous wherein it grants to the complainants the adjudged relief of cancellation and injunction, and wherein it orders that respondent King repay the money paid to him by complainants; there being no evidence adduced that complainants, or either of them, suffered any damage or injury by reason of the alleged false or fraudulent conduct or representations on the part of the respondents.

VI.

That said decree is erroneous in granting any relief to the complainants, there being no evidence of false or fraudulent conduct or representations on the part of the respondents, or either of them.

VII.

That the decree is erroneous and against law in granting the adjudged relief to complainants, it appearing from the evidence that before executing the contract of sale and notes referred to in the bill of complaint, complainants made a thorough inspection of the property, and were induced to execute said contract and notes by reason of their own observation and investigation and not by reason of any false or fraudulent representations or conduct on the part of respondents.

VIII.

That the decree is erroneous in that it adjudges relief to complainants and against respondents as prayed for in the bill of complaint; the evidence as a whole clearly showing that the decree should have been in favor of respondents.

IX.

That the decree is erroneous in adjudging to complainants the relief of cancellation and injunction, and in adjudging that respondent Harry G. King pay to complainants the money paid to him by complainants; the decree in this respect being necessarily based upon the conclusion of the court that complainants suffered damage and injury by reason of false and fraudulent representations made to them by respondents as to the production of coal for the year preceding the date of the contract, when in fact such conclusion is not sustained or supported by the evidence; the evidence clearly showing that if the alleged representations were in fact made, and if the same were false, complainants suffered no damage or injury by reason thereof, for the reason that it clearly appears that the mine contained ample coal to supply the quantity it is claimed respondents stated it had produced, and it further appears from the evidence that complainants during their management of the mine had orders for all coal mined by them, and in fact on several occasions failed to mine coal sufficient to fill orders received.

In order that the foregoing assignments of error may be and appear of record, respondents present the same to the Court and pray that such disposition

be made thereof as in accordance with law and the Statutes of the United States in such cases made and provided, and respondents pray a reversal of said decree made and entered by said court.

CLARK & BUDGE,
Solicitors for Respondents.

Residence & P. O. Address,
Pocatello, Idaho.

[Endorsed]: Filed with the petition for appeal Oct. 15, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Respondents.

Petition [for Appeal, etc.].

To the Honorable FRANK S. DIETRICH, District Judge, and One of the Judges of the Above-named Court, presiding therein:

The above-named respondents, Harry G. King and Maria J. King, his wife, conceiving themselves aggrieved by the order and decree made and entered by the above-entitled cause under date of August 29, 1910, wherein and whereby, among other things, it was and is ordered, adjudged and decreed that a certain contract of sale and certain notes referred to

and set forth in the Bill of Complaint in said cause, be cancelled, rescinded and declared utterly void and of no effect, and also adjudging and decreeing that the said respondent, Harry G. King, pay to the complainants the sum of Twenty-two Thousand Eight Hundred ($22,800.00) Dollars; and also that said respondents surrender and deliver up for cancellation the said contract of sale and said notes above referred to, and enjoining and restraining said respondents from setting up or claiming any rights under said contract and notes, and also adjudging that complainants have and recover their costs herein, amounting to the sum of $403.35, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said order and decree, for the reasons set forth in the Assignment of Errors which is filed herewith; and they pray that this, their petition for said appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 15th day of October, 1910.

CLARK & BUDGE,
Solicitors for Respondents.

[Endorsed]: Filed October 15, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Respondents.

Order Allowing Appeal.

Upon motion of Messrs. Clark & Budge, solicitors and counsel for respondents, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore filed and entered herein, be and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed in the sum of Five Thousand ($5,000.00) Dollars, the same to act as a supersedeas bond, and as a bond for damages, costs and interest on appeal.

Dated this 15th day of October, 1910.

FRANK S. DIETRICH,

District Judge, and one of the Judges of said United States Circuit Court, presiding therein.

[Endorsed]: Filed Oct. 15, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Respondents.

Undertaking on Appeal.

Know All Men by These Presents: That we, Harry G. King and Maria J. King, his wife, as principals and Peter McKinney and Norman I. Andrews, as sureties, of the County of Lemhi, State of Idaho, are held and firmly bound unto Arthur H. Lamborn and John G. Richards in the sum of Five Thousand ($5,000.00) Dollars, lawful money of the United States, to be paid to them and their respective executors and administrators, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our hands and dated this 25th day of October, 1910.

Whereas lately in the Circuit Court of the United States for the District of Idaho, Southern Division, in a suit pending in said court between Arthur H. Lamborn and John G. Richards, complainants, and Harry G. King and Maria J. King, respondents, a

decree was rendered against said respondents; and,

Whereas, said respondents have obtained from said Court an order allowing an appeal to reverse the decree in the aforesaid suit, and a citation directed to said Arthur H. Lamborn and John G. Richards, complainants, citing and admonishing them to be and appear in the United States Circuit Court of Appeals, Ninth Circuit, to be holden at San Francisco in the State of California; and

Whereas, respondents desire to give a supersedeas bond, as well as one for indemnity for just damages for delay, and costs and interest on appeal;

Now, therefore, the conditions of this obligation are such that if the above-named respondents shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

HARRY G. KING,
MARIA J. KING,
Principals.
PETER McKINNEY,
NORMAN I. ANDREWS,
Sureties.

State of Idaho,
County of Lemhi,—ss.

Peter McKinney and Norman I. Andrews, whose names are subscribed to the foregoing undertaking as sureties, being severally duly sworn each for himself deposes and says; that he is a resident and freeholder within the State of Idaho, and within the Southern Division of the District of Idaho; that he

is worth the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities exclusive of property exempt from execution;

Said Peter McKinney deposes that he owns and possesses the following described property situated in Lemhi County, Idaho, which is worth $5,000.00, to wit:

Real Estate—three hundred and twenty acres.

Said Norman I. Andrews deposes that he owns and possesses the following described property situated in Lemhi County, Idaho, which is worth $5,000.00, to wit:

Five hundred and twenty acres, real estate.

NORMAN I. ANDREWS.
PETER McKINNEY.

Subscribed and sworn to before me this 25th day of October, 1910.

[Seal] ENOCH W. WHITCOMB,
Notary Public.

My commission will expire November 26, 1912.

This bond approved as to form, amount and sufficiency of sureties.

Dated this 28th day of October, 1910.

FRANK S. DIETRICH,
District Judge, and one of the Judges of said United States Circuit Court presiding therein.

[Endorsed]: Filed Oct. 28, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Stipulation [Excluding Defendants' Exhibits 9 and 15 from Record].

It is hereby stipulated and agreed by and between the respective parties in the above cause, through their attorneys of record, that it shall be unnecessary for the Clerk to transmit to the Circuit Court of Appeals, Defendants' Exhibits 9 and 15, the same being samples of coal taken from the King Coal Mine near Salmon, Idaho, and that said exhibits may be excluded from the record.

RICHARDS & HAGA,
Attorneys for Plaintiffs.
CLARK & BUDGE,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 3, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Stipulation [Excluding Certain Papers from Record].

It is hereby stipulated by and between the respective parties in the above-entitled cause, through their attorneys of record, that it shall be unnecessary for the Clerk to transmit to the Circuit Court of Appeals, the Affidavit on Attachment, the Attachment Writ and the Return thereto, the Undertaking on Attachment, and the Notice of Levy on Real Estate on Attachment, and that said papers may be excluded from the record.

Dated this 3d day of November, 1910.

RICHARDS & HAGA,
Attorneys for Plaintiffs.
CLARK & BUDGE,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 4, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Plaintiffs,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Defendants.

Praecipe for Transmission of the Record.

To the Honorable A. L. Richardson, Clerk of the Above-entitled Court:

You are respectfully requested to certify and transmit to the Circuit Court of Appeals for the Ninth Circuit, the following papers and documents, as the record in said cause, in response to the order allowing the appeal, on file herein:

1. Bill of Complaint.
2. Joint and Several Demurrers of the Defendants and each of them.
3. Joint and Several Answers of the Defendants and each of them.
4. Replication.
5. Stipulation as to the taking of testimony.
6. All evidence taken in said cause including all Exhibits.
7. The Opinion of the Court.
8. The Decree.
9. The Petition for Allowance of Appeal.
10. Assignment of Errors.

11. Order allowing Appeal and fixing Bond.
12. Citation on Appeal.
13. Undertaking on Appeal.
14. Stipulation for the exclusion of certain exhibits.
15. Stipulation for the exclusion of certain papers, relating to attachment.

Dated this 1st day of November, 1910.

CLARK & BUDGE,
Attorneys for Defendants and Appellants.

[Endorsed]: Filed Nov. 3, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States, District of Idaho, Southern Division.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,

Complainants,

vs.

HARRY G. KING and MARIA J. KING, His Wife,

Respondents.

Citation [Original].

The President of the United States, to Arthur H. Lamborn and John G. Richards, and Richards & Haga, Their Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the District of Idaho,

Southern Division, wherein Arthur H. Lamborn and John G. Richards are complainants and Harry G. King and Maria J. King are respondents, to show cause, if any there be why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done in that behalf.

Witness the Honorable FRANK S. DIETRICH, Judge of the United States Circuit Court in and for the District of Idaho, Southern Division, this 28th day of October, 1910.

FRANK S. DIETRICH,
District Judge, and one of the Judges of said United States Circuit Court, presiding therein.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

Service of the within citation and receipt of a copy thereof admitted this 28th day of October, 1910.

RICHARDS & HAGA,
Solicitors for Appellees, and Complainants in Lower Court.

[Endorsed]: No. 131. In the Circuit Court of the United States, District of Idaho, Southern Division. Arthur H. Lamborn et al., Complainants, vs. Harry G. King et al., Respondents. Citation. Filed on Return Oct. 28, 1910. A. L. Richardson, Clerk.

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit

Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 428, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $60.00, and that the same has been paid by the appellant.

Witness my hand and the seal of said Circuit Court affixed at Boise, Idaho, this 5th day of November, 1910.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1913. United States Circuit Court of Appeals for the Ninth Circuit. Harry G. King and Maria J. King, His Wife, Appellants, vs. Arthur H. Lamborn and John G. Richards, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Idaho, Southern Division.

Filed November 12, 1910.

F. D. MONCKTON,
Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 1913

HARRY G. KING, and MARIA J. KING, *Appellants,* vs. ARTHUR H. LAMBORN and JOHN G. RICHARDS, *Appellees.*	IN EQUITY. *Appeal from Circuit Court, District of Idaho, Southern Division.*

BRIEF OF APPELLANTS

CLARK & BUDGE,
Attorneys for Appellants.

Filed *1911*

..... *Clerk*

IN THE

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARRY G. KING, and MARIA J. KING,
Appellants,

vs.

ARTHUR H. LAMBORN and JOHN G. RICHARDS,
Appellees.

STATEMENT OF THE CASE.

The plaintiff, Arthur H. Lamborn, is a resident of the State of New Jersey. The plaintiff, John G. Richards, claims to be a resident of the State of Texas. The defendants are residents of Salmon City, Lemhi County, Idaho.

It appears from the evidence that the defendant, Harry G. King, on or about the first day of September, 1907, purchased from one Pollard a tract of land comprising 480 acres adjoining the townsite of Salmon City, Lemhi County, Idaho. (Transcript, Vol. 2, Pages 372 and 398.) King paid Pollard $30,000.00 for this coal mine and the 480 acre tract, and thereafter continued to work the mine. (Transcript, Vol. 2, Page 374.) Short-

ly after King purchased the property the plaintiff Richards, with whom King had become acquainted during the spring of 1906, and who had for some months been living at and about Salmon City, visited the property with Mr. King and made an examination of it. (Transcript, Vol. 1, Pages 112 to 114.) Richards was a mining promoter. (Transcript, Vol. 1, Page 152.) He became very enthusiastic as a result of his investigation and ascertaining that King would sell the property, they talked the matter over with the result that it was understood between them that Richards, who was then about to leave for the east, should, if possible, effect a sale. About the first of March, 1908, while Richards was in Colorado, and after there had been considerable correspondence with Mr. King, Richards sent King, for his signature, a document which is designated as an agreement (Plaintiff's Exhibit 9, page 422, Transcript, Vol. 2), whereby King agreed, among other things, to sell the property to Richards for the sum of $80,000.00, one-half to be paid on or before January 1, 1909, and the balance on or before January 1, 1910. The real purpose of this agreement, however, was to place the property subject to Richards' disposition and not as its terms imply, to give him the right to make the purchase himself, for he had no thought of purchasing, and it was understood that Richards was to receive as commission, all above $50,000.00 that he might obtain on a sale; in other words, King agreed to pay Richards $30,000.00 of the $80,000.00 purchase price. (Transcript, Vol. 1, pages 167 to 170.) Richards then proceeded east, visiting Kansas, Ohio, Texas and Washington, D. C., and

finally reached New York during the first part of June, 1908, where he called upon the plaintiff Lamborn, and submitted to him the coal proposition. Lamborn and Richards about a year before had spent some time together in Old Mexico, and Richards states that he called upon Lamborn upon this occasion in order to secure his assistance in reaching some person or persons in New York City who might be interested in considering the purchase of the coal mine. Without going too much into detail, it is sufficient to say that Lamborn himself upon the representations which Richards made to him concerning this property, decided that he would look into it for himself. (Transcript, Vol. 1, pages 172 to 180.) Richards induced Lamborn to consent to come west and visit the mine and property. (Transcript, Vol. 1, page 131.) Richards then returned to Salmon City for the purpose of examining the property (Transcript, Vol. 1, page 129, also page 197, Vol. 1), visited the mine from time to time, inspected and examined it, made inquiries of the Superintendent, one F. C. Miller, and otherwise interested himself in securing all the information he could, preparatory to the purchase which he expected to make upon Lamborn's arrival. (Transcript, Vol. 1, pages 164 to 165.) Lamborn reached Salmon City about the 26th of June, where he met Mr. King and discussed with him and Richards the proposition of a purchase by Richards and Lamborn of a three-fourths interest. At this time there was considerable talk among them concerning the incorporation of a company in which Mr. King was to have a one-fourth interest, and the issuing of bonds for the sum of $80,000.00, a portion of which

bond issue Mr. King should accept as a part of the purchase price. It was also agreed between King and Richards that Richards' commission should be paid in bonds to the amount of $22,500.00, the amount of commission due for a sale of the interest purchased by Lamborn and himself. (Transcript, Vol. 2, pages 309 to 314.) It is also apparent from the evidence that all the parties indulged in considerable conjecture in making estimates of what the mine would in the future produce in the event that a railroad should be built into Salmon, and also as to what might be realized as profits upon the investment. Mr. Lamborn is a New York sugar broker. During the four days of Mr. Lamborn's sojourn at Salmon, he visited the property on three or four occasions. Went into the mine and made such examination as he desired; he also made such inquiries of the Superintendent as he desired; took samples of coal from the mine and watched them burn to test their fuel qualities, and otherwise interested himself to acquire all information which he deemed necessary. (Transcript, Vol. 2, pages 315 to 317.) After fully satisfying himself as to the value of the property, and the prospects for its future development, he with the other parties entered into the agreement designated as Plaintiffs' Exhibit H.

Prior to the bringing of this suit there had been paid to Mr. King in accordance with the terms of this agreement some $21,000.00, and Mr. King had received notes for the balance. After this agreement was signed Mr. Richards assumed charge of the property and operated the same with Mr. Miller as Superintendent, up to the following March. The work at the mine during this

time, however, consisted in forcing a new tunnel, which had been started by Mr. King after he took possession, for the purpose of placing the property in a better condition to be worked, and not for the purpose of increasing the production. They, of course, took out such coal as appeared in the face of the tunnel, and sold this coal to the people of Salmon City. (Transcript, Vol. 1, pages 199 to 203.)

During the month of January, 1909, he states that his suspicions became aroused, and that after satisfying himself that he had been deceived by King he lost interest in the work and allowed matters to drift along until about the middle of March, when he determined to rescind the contract, and to bring King to account.

This action was brought to cancel the agreement and the notes which the plaintiff executed, and to recover from King the money paid by the plaintiffs on account of the purchase of the three-fourths interest.

It is alleged in the bill of complaint that the defendant King for the purpose of inducing the plaintiffs to enter into said contract, and to make the payments which were made, and for the purpose of cheating and defrauding the plaintiffs, falsely and fraudulently represented that the property,

"Was of great commercial value by reason of the coal deposits therein contained as shown by the development of such property by the said defendant, and discovered and disclosed by the workings thereon, and that the investment to be made by your orators therein pursuant to the terms of said contract, would result in great profit to your orators; that the said defendant stated and rep-

resented that the entire breast of what was known and designated as the 'old room' in the workings and excavations on said property, was clean coal and did not require any sorting, and was the same strata as the upper strata then exposed at the breast of the new entry, when in truth and in fact at the time of making the above mentioned statements and representations, the said defendant, Harry G. King, knew the same, and each of them to be false and untrue."

It is further alleged:

"That for the purpose of confirming the above statements and inducing your orators and each of them to enter into said contract, and make said payments, and deliver the said notes to the defendants, the defendant Harry G. King fraudulently and falsely stated and represented to your orators, and each of them, that during the eleven months preceding the making of such contract, 'Exhibit A,' that said defendant, Harry G. King, in developing such property, and extracting coal therefrom, had mined 2300 tons of coal from such property, and had sold that amount of coal to consumers residing in and around the said town of Salmon City, and that had he, the said Harry G. King, not been prevented from soliciting orders personally by reason of his banking and other business, he could have mined therefrom and sold in said community 3000 tons of coal in said time, and with the assistance of defendant John G. Richards during the coming year, if such agreement was entered into, such tonnage and sales could be largely increased, and that the profits from such property would not be less than $9000.00 for the first year; and that in addition to the above mentioned tonnage so mined and sold from such premises during the time above stated, said defendant Harry G. King falsely and fraudulently stated that he had mined and sold from such premises

during the time above mentioned, 300 tons of coal to the Copper Queen mine, when in truth and in fact the said Harry G. King at the time of making such statements and representations knew the same to be false and untrue, and knew that the said defendant had not during the said time mined or excavated from the said premises or sold to consumers to exceed 700 tons of coal, and that the defendant during such time had not mined from said premises for or sold to said Copper Queen mine to exceed 25 tons of coal, and your orators were greatly deceived and injured by such false and untrue statements; and the said premises and property are practically of no value whatsoever.''

In their answer defendants deny that such representations were made, or that by reason thereof plaintiffs were induced to enter into said contract or to execute said notes, or to make payment of said money, and allege the facts to be that all of said acts were done and performed by the complainants after full examination and inspection of said property, and after the complainants had thus become fully advised in the premises. The Judge of the trial court decided that the representation as to the amount of the tonnage had been proven to be false, and that therefore the contract should be rescinded, although his finding is that no damage was suffered thereby, and that plaintiff Richards did not come into equity with clean hands. This appeal is presented to obtain a reversal of this judgment.

ASSIGNMENT OF ERRORS.

I.

That said decree is erroneous wherein it adjudged

the cancellation of the contract of sale and notes referred to and set forth in the bill of complaint herein, and in restraining and enjoining the respondents from setting up or claiming any rights under said contract and notes; the said decree in this respect being necessarily based upon the conclusion that respondents induced and procured the execution and delivery of said contract and notes by their false and fraudulent conduct and representations, when as a matter of fact such conclusion is not sustained or supported by the evidence.

II.

That said decree is erroneous wherein it holds the respondent, Harry G. King, liable for, and wherein it requires said respondent to pay to the complainants the money heretofore paid by complainants on account of the contract set forth in the bill of complaint, to-wit: $6,000.00 paid July 20, 1908, and $15,000 paid on January 1, 1909, with interest thereon from June 8, 1909, at the rate of seven per cent per annum, making a total aggregate of $22,800.00; said decree in this respect being necessarily based upon the conclusion that said payments were induced and made by reason of the false and fraudulent representations and conduct of the respondents, when in fact such conclusion is not sustained or supported by the evidence.

III.

That said decree is erroneous wherein it adjudges that the respondents, Harry G. King and Maria J. King, surrender and deliver up for cancellation the said contract of sale and notes described in said decree; said decree in

this respect being based upon the conclusion that respondents induced and procured the execution and delivery of said contracts and notes by false and fraudulent representations and conduct, when in fact such conclusion is not sustained or supported by the evidence.

IV.

The bill of complaint and evidence shows that the complainants, Arthur H. Lamborn and John G. Richards, were jointly interested and acted jointly as parties to the contract of sale set forth in the bill of complaint, and in all matters growing out of or relating to said contract; the evidence further shows that complainant, John G. Richards, did not come into equity with clean hands, but was guilty of such conduct as to estop him from claiming or obtaining any relief in equity; the decree entered herein is therefore erroneous wherin it adjudges relief to complainants, one of whom is not entitled to recognition in a court of equity.

V.

That the decree is erroneous wherein it grants to the complainants the adjudged relief of cancellation and injunction, and wherein it orders that respondent King repay the money paid to him by complainants; there being no evidence adduced that complainants, or either of them, suffered any damage or injury by reason of the alleged false or fraudulent conduct or representations on the part of the respondents.

VI.

That said decree is erroneous in granting any relief

to the complainants, there being no evidence of false or fraudulent conduct or representations on the part of the respondents, or either of them.

VII.

That the decree is erroneous and against law in granting the adjudged relief to complainants, it appearing from the evidence that before executing the contract of sale and notes referred to in the bill of complaint, complainants made a thorough inspection of the property, and were induced to execute said contract and notes by reason of their own observation and investigation and not by reason of the false or fraudulent representations or conduct on the part of respondents.

VIII.

That the decree is erroneous in that it adjudges relief to complainants and against respondents as prayed for in the bill of complaint; the evidence as a whole clearly showing that the decree should have been in favor of respondents.

IX.

That the decree is erroneous in adjudging to complainants the relief of cancellation and injunction, and in adjudging that respondent Harry G. King pay to complainants the money paid to him by complainants; the decree in this respect being necessarily based upon the conclusion of the court that complainants suffered damage and injury by reason of false and fraudulent representations made to them by respondents as to the production of coal for the year preceding the date of the contract, when in fact such conclusion is not sustained

or supported by the evidence; the evidence clearly showing that if the alleged representations were in fact made, and if the same were false, complainants suffered no damage or injury by reason thereof, for the reason that it clearly appears that the mine contained ample coal to supply the quantity it is claimed respondents stated it had produced, and it further appears from the evidence that complainants during their management of the mine had orders for all coal mined by them, and in fact on several occasions failed to mine coal sufficient to fill orders received.

ARGUMENT.

We desire first to discuss Assignment No. 4, for the purpose of explaining in the outset the relations existing between the plaintiff, John G. Richards, and the plaintiff, Arthur H. Lamborn, and the defendant Harry G. King, for the purpose of demonstrating that the plaintiff, John G. Richards, is not entitled to any relief in a court of equity. That his conduct in this matter has been such as to convict him of double dealing and deception, and we believe that we are justified in saying that Arthur H. Lamborn could not have been in ignorance of that deception. This is not a case where an ignorant or confiding person has been imposed upon by false or fraudulent representations, but it seems to us that the plaintiffs themselves were guilty of such deception and double dealing as to estop them from asking relief at the hands of a court of equity.

The plaintiff, John G. Richards, is a mining promoter.

He met the respondent King at Salmon City, Idaho, in the spring of 1906 (Tr., Vol. 1, p. 109), and made King's bank at that place his principal loafing place. (Tr., Vol. 1, p. 110.) In August, 1907, Richards went up and looked over this property in controversy (Tr., Vol. 1, p. 112), and considered it to be an excellent proposition. (Tr., Vol. 1, p. 115.) After doing so, Richards conceived the idea that he could sell the property for Mr. King, and with that object in view prepared the agreement introduced in evidence and marked "Exhibit G," and found at page 422 of Volume 2 of the transcript. This agreement Richards prepared himself and sent it to King from Winfield, Kansas. (Tr., Vol. 1, p. 168.) Under the terms of this agreement the purchase price was to be $80,000.00 and Richards was to have $30,000.00 commission for making the sale. (Tr., Vol. 1, p. 169.) After he procured this agreement from Mr. King whereby he was to act as Mr. King's agent in the selling of the property, he went east to attempt to promote the sale, and after visiting Washington, D. C., wound up in New York City, where he met the plaintiff Lamborn, whom he had known and had dealings with in Mexico. (Tr., Vol. 1, pp. 172 and 173.) The agreement designated as plaintiff's "Exhibit G," heretofore referred to, is dated March 1, 1908, as early as December 26, 1907, Richards had written to Mr. King from Golden, Colorado, as shown by defendant's Exhibit No. 1 on cross-examination (Vol. 2, Tr., p. 433), in which letter he uses the following language:

"The plan I prefer to work on is first to sell a one-half interest, and then in about a year to sell to the same

people the other one-half, and to do it at a nice figure. The object is to first get them interested and to do it as gently as possible. After that we can go after the big money."

Again in the same letter he uses this language:

"I would prefer to meet you some place and talk this over if the plan is suitable. If the general plan sounds good let me know at once as I can go on making my medicine."

Again on January 10, 1908, in defendant's exhibit 2, found at page 435 of Vol. 2 of the transcript, in writing to Mr. King, Richards uses the following language:

"But I prefer to handle it in the east as it would give us the better chance to make the big money when the second shouting comes. I shall leave here about the 20th for the south, going by way of Arizona to Texas to the ranch. In the meantime I shall have the wires working to perfect the plans by which we are to secure the dough."

Again on the 23rd of January, 1908, he writes to Mr. King, as shown by Exhibit 3, found at pages 436 and 437 of the transcript, Vol. 2, as follows:

"Now I am working on the plan of getting at least $20,000.00 the first year. Am offering one-half interest and am *supposed* to be taking care of the other half with you. Of course I must be *supposed* to be putting in some money myself."

Again in the same letter he uses the following language:

"If we can make good on the first half we can sell the other half for all the whole thing is really worth. It is at the second spasm that I expect to see the big shouting."

Again on the 12th day of March, 1908, apparently at the time the agreement marked "Plaintiff's Exhibit G" was made, Richards writes King as shown by Exhibit No. 5, found at pages 437 and 438 of Transcript, Vol. 2, as follows:

"Will send you agreements to sign, and send me one. Of course I am selling only a half, but I desire to represent that I am investing some, too, so that a contract for the whole is necessary."

And again after Richards had arrived at New York City, and at a time when he was apparently in conference with Lamborn, he writes as shown by Defendant's Exhibit No. 6, found at page 438 of the transcript, Vol. 2, as follows:

"Am in here and talking to the right people and have them interested. Now if I can carry them through we will not only do business now, but can keep on doing business with the other properties that may lie adjacent. I am trying on basis $40,000.00 for half interest, representing that I am buying one-fourth, which we can fix up all right between us."

And again at page 439 of Transcript, Vol. 2, we find a telegram dated on June 19, 1908, which is addressed to Mr. King at Salmon City, and signed by J. G. Richards. This telegram was dictated by Mr. Lamborn, who immediately turned around and gave it to a messenger boy and sent it to the telegraph office. Richards followed the boy out and sent to Mr. King the telegram shown as Defendant's Exhibit "A," found at page 440 of Vol. 2 of the transcript, wherein he instructed Mr. King how this telegram that he had sent should be answered. (Tr., Vol. 1, p. 187.) Shortly after sending the telegram Mr.

Richards returned to Salmon City, Idaho, to confer further with Mr. King (Vol. 1, Tr., p. 129), and represented to Mr. King that he was negotiating with Mr. Lamborn for a half interest, and that he had represented to Mr. Lamborn that he was taking a fourth interest, and he wanted King to be very careful not to give away that part of it, but that that could be fixed up all right between themselves. He also stated to Mr. King that at the time he had sent the telegram instructing him how to answer the other telegram that Mr. Lamborn had dictated, the long telegram, and that Lamborn had sent it by messenger out of the office and that he had no opportunity for some time afterwards to get to the telegraph office and offset that telegram (Vol. 2 of Tr., p. 377).

Thereafter Lamborn came on to Salmon City and it was then that the agreement, Plaintiff's Exhibit "H," (Vol. 2 of Tr., p. 422), was entered into for the sale of this property, and it is this agreement which the plaintiffs herein are attempting to rescind in this action.

It will be noted that $7500.00 in cash was paid at the time, and it seems that $1000.00 of this was paid by Richards. Under this arrangement with Mr. King $22,500.00 was to become payable on the first day of January, 1909, and Arthur H. Lamborn was to execute and deliver four promissory notes aggregating $10,000.00, which should make up the purchase price of the three-fourths interest in the property. Then the property was to be bonded for the sum of $80,000.00, $40,000.00 of the bonds to be issued to Harry G. King, $7500.00 to John G. Richards, and $32,500.00 to Arthur

H. Lamborn. And in order to make up Richards' commission of $30,000.00 he was to receive from King $22,500.00 of the $40,000.00 issued to Mr. King. Now Richards states that he had arranged with Lamborn to divide with him the $30,000.00 commission which he was to receive. (Vol. 2, Tr., p. 226.) This was definitely agreed upon according to the statement of Richards at the time Richards and Lamborn were on their way from Salmon City to Red Rock on their return after the contract was entered into. This seems a little strange in view of the language of plaintiff's Exhibit "J," found at page 427 of the transcript, Vol. 2, in which Richards in writing to Lamborn states:

"I secured an agreement from King in regard to the bonds that will work to our mutual benefit quite materially if I succeed with it, and I don't see how it will fail. Now I can go more into detail after I discuss the matter with Cowan, but I expect to draw $22,500.00 bonds our way. From what O'Brien says we can force King to put up a bond to pay the interest on the bonds, $80,000.00."

This last letter, plaintiff's Exhibit "J," was written on March 5, 1909, and Richards and Lamborn both state that they had decided to cancel the contract in the month of January, 1909. It seems to us that one thing is very evident in this case, that Richards was giving either King or Lamborn the double cross. He went out to sell this property as King's agent, and it is quite apparent from the language he uses that he was no innocent or confiding individual. He was a mining promoter, a man skilled in the art of inducing people to buy mines, that was his business, and he prepared the agreement him-

self and wrote King that he was going to represent that he was becoming a part purchaser in the mine, and that they could fix that up between them, and to use his own language: "It was at the second spasm that he expected the big shouting."

These letters relate the true history of this matter much better than does the testimony of Lamborn or King. It is quite evident that Lamborn and Richards agreed as between themselves as to what their testimony should be because their testimony is at direct variance with these letters. The letters bear out King's testimony to the effect that Richards was not becoming a bona fide purchaser of any part of this property, but was simply attempting to get Lamborn to put up the money in such a way as to satisfy King, and Richards would obtain his fourth interest in the property for nothing, and that then they would bond it for $80,000.00 and sell the bonds, and thus Richards would enrich himself to the extent of $30,000.00. It is not quite apparent from the testimony who Richards finally was working with. If we take Richards' testimony at its face value it seems that Richards was representing to King that Lamborn was the victim, and that Lamborn and Richards had fixed it as between themselves to make King the victim. There then came a slump in the bond market, and they were unable to dispose of their bonds and Lamborn concluded to stand in with Richards and cancel the contract, and hence this suit.

To show the evident bad faith of this man Richards, nothing could be more illuminating than his letter to Lamborn written on March 5, 1909, long after he states

that he had concluded to rescind the contract. In this letter he states that he has taken legal advice and was going to force King to put up a bond to pay the interest on the $80,000.00 bond issue. And again he states that there is another point that he wanted to have reached before he started anything, and that was with reference to the distribution of the bonds when they were issued.

Lamborn also is no ignorant or innocent or confiding person. King paid $30,000.00 for this property long before he had ever seen Richards or Lamborn, indicating that King at least believed that his property was a valuable one. In this deal if he had made it he was not obtaining any very startling increase on the value of his property, but it was a pretty good deal for Richards and Lamborn because they were obtaining from King a $30,000.00 commission for selling the property to themselves, and were only having to pay in actual cash about $40,000.00, and were obtaining back in first mortgage bonds, $65,000.00 which they expected to at once dispose of.

The trial court was of the opinion that Richards was not entitled to relief in a court of equity. The trial judge states that if Richards were alone asking for relief he would be inclined to dismiss the bill. (See opinion trial court, Vol. 1, Tr., p. 70.)

We submit that this is a joint action, that Richards and Lamborn have laid down in the same bed together and the record discloses that their testimony has been studiously prepared so that they may hang together. If one of these joint parties is not entitled to relief,

certainly neither of them can have relief in this suit, and if it were not for the letters written, and other evidences outside of their testimony this court could have no just conception from their testimony of the real facts in this case. We repeat that the testimony shows that either Richards and King were double crossing Lamborn, or Lamborn and Richards were double crossing King. And in either event this suit cannot be maintained. Richards' letters to King indicate that he is what might properly be designated as a "get rich quick Wallingford," and Lamborn's actions in this case indicate that he is not unacquainted with the methods of "high finance," and we are of the opinion that the record in this case discloses that their actions have been such that they are not entitled to any consideration whatever at the hands of a court of equity, and particularly is this true as to Richards. We submit that Richards did not come into this case with clean hands, and that the actions of Lamborn are not such as to place him in the class of those innocent and confiding persons who are swindled by designing individuals by false representations. For this reason, if for no other, this case should have been determined in the lower court in favor of the respondents and the bill dismissed.

SUFFICIENCY OF THE EVIDENCE TO ESTABLISH FALSE AND FRAUDULENT REPRESENTATIONS.

Under this heading we desire to discuss Assignments of Error numbered 1, 2, 3, 6 and 8, which all go to the sufficiency of the evidence to justify the court in enter-

ing a decree rescinding the contract in this case on account of alleged false and fraudulent representations and conduct of the respondents.

In this connection it may be well to call attention to the fact that the trial judge considered that only one allegation of the plaintiffs' complaint, to-wit: the allegation as to the false representation as to the output of the mine, had been proven. The trial court decided that no other false representation was proven by plaintiffs to have been made. However, as it is necessary to consider this case as a whole, we desire to discuss the various allegations of fraud made in plaintiff's complaint for the purpose of demonstrating that under the evidence the plaintiffs were not entitled to relief even though the court should adjudge that they came into equity with clean hands.

Analyzing the allegations of fraud, it may be said that defendants are charged with the following representations which it is contended formed the inducement for plaintiffs executing the contract, signing and delivering the notes and paying the money to defendant King, to-wit:

(a) That the property was of great commercial value by reason of the coal deposits therein contained as shown by the development of said property by said defendant, and discovered and disclosed by the workings thereon.

(b) That defendant had mined, and sold in Salmon City 2300 tons during the eleven months prior to the date of said contract.

(c) That defendant had sold 300 tons to the Copper Queen mine.

(d) That the entire breast of the "old room" was clean coal, and did not require any sorting, and was of the same strata as the upper strata in the new workings.

(e) That the investment made by the plaintiffs would result in great profit to them.

(f) That if plaintiffs would enter into the agreement the sales for the coming year could be largely increased by reason of the assistance which Richards might lend to the enterprise.

If it be conceded for arguments sake that defendant did make the statements and representations embraced within the subdivisions *(e)* and *(f)*, and that such representations were false, and that they were made with knowledge of their falsity for the purpose of inducing the plaintiffs to enter into the contract, and did actually form part of such inducement, still we think it cannot be seriously contended that they furnish any basis for this suit. They are mere expressions of opinion of what might result in the future, and it is well settled that neither promises, nor expressed opinions or beliefs concerning future events or conditions will furnish ground for the rescision of a contract.

Farwell vs. Colonial Trust Co., 147 Fed., 480.
Sawyer vs. Prickett, 19 Wall., 146; 22 Law. Ed., 105.
Railroad Company vs. Barnes, 64 Fed., 80, 82.

Daniels vs. Benedict, 97 Fed., 367, 380.
James Music Co. vs. Bridge, 114 N. W., 1108.

The other elements of alleged fraud may be conveniently grouped under three heads, to-wit:

(a) The representations that the property was of great commercial value by reason of the coal deposits.

(b) The representations concerning the output of the mine.

(c) The representations that the breast of the "old room" was clean coal and did not require sorting, and was of the same strata as the upper strata in the new workings.

It is upon these three elements of the case that plaintiffs rely to establish their right to a cancellation of the contract. They only allege by inference that these representations were false and fraudulent; they do not allege that they were made with a knowledge of their falsity, and for the purpose of inducing plaintiffs to act upon them; that the plaintiffs did act upon them, and entered into the contract by reason thereof, and that they have been damaged. We will consider these elements of alleged fraud in the order in which they appear above.

As to the Value of the Property.

If the defendant King stated and represented that the property was of great commercial value by reason of the coal deposits therein as appeared from the workings thereon, we are quite sure that if the proof established that such statements and representations were false,

that that would not be a ground for rescision; that it would be merely considered as "trade talk" or "puffing," such as is indulged in by almost every person who has something for sale, and it has always been the rule that courts will not relieve persons from contracts when they have entered into them by reason of such statements. It is presumed that men of ordinary prudence will not be misled by the exaggerated ideas which a person may possess and express concerning the value and character of his own property, and in this case we might stand upon this rule; for "statements which are expressions of opinion by the vendor in respect to the value of the property sold, are not fraudulent in law to the extent that the sale will be set aside if they are untrue."

Southern Development Co. vs. Silva, 125 U. S., 247; 31 L. Ed., 678.

We are content, however, to consider the evidence upon this phase of the case for the purpose of ascertaining whether or not King made any false statements concerning the commercial value of this property by which the plaintiffs were misled to their injury. In one of his letters to Mr. Richards of date October 30, 1907, Mr. King states:

"The coal business is a bonanza, and I am more than satisfied that the thing to do is to hold it for a while, and December 1st I will have the deed to the whole thing, then there will be no hurry in handling it as I feel sure that a railroad would make it worth $250,000.00 and it cannot depreciate as a local proposition without a railroad. I have delivered since September 1st, in

town, 450,000 pounds of coal and no cold weather yet. I have pushed the tunnel 100 feet further and the coal is 25 per cent better, and holds its thickness.

You can send me the $1000.00 and I will send you a note for the same. This will help out as I have nearly all the balance, and when you think the time is ripe we can talk up a deal, and I will have the mine in such shape as to show it to best advantage, as I am not storing but getting plenty of coal by pushing the tunnel, which is only developing the mine. I could have sold the mine the other day for $50,000.00, but I am sure it will be just as easy in the spring to get $100,000.00 as it will pay good interest on that amount. I am so anxious to get it in my name, then we will be in proper shape to do what is best." (Tr., Vol. 2, pages 419 and 420.)

Again Mr. King writes on December 19, 1907:

"Say, Dick, the coal mine is a trump, have delivered over 500 tons already, at $6.00, and Miller is opening her up in fine shape. You would not know it. Have a big tunnel, use mules on cars, three foot track, 16 pound rails, large blacksmith shop, office, new sheets and screens, our own weigh scales and everything up to date. The outlay cost me about $2000.00, but it was money well spent. McQuarry thinks it worth about a quarter of a million, and people here seem to think the same thing now. The railroad surveyors are cross sectioning." (Tr., Vol. 2, page 421.)

These letters constitute the proof of the allegations that King represented the property to be valuable.

Now let us consider the evidence as to whether these statements were tru or false.

Plaintiffs produced one Robert Forrester, a geologist

and mining engineer of considerable experience, who about the 10th of May, 1909, made an examination of this coal mine, and who in substance and effect stated that he had spent about one-half day in the mine; that he had taken certain samples of coal therefrom and analyzed them; that he had found they possessed a large percentage of carbonaceous materials and sandstone; that the coal is known as bone coal and possesses too much ash to render it valuable as a fuel, and that in fact this particular coal was of no commercial value. He testifies as follows:

"Q. Now you say that this coal is not commercial coal?

A. Not of commercial value.

Q. What do you mean by that?

A. That it has not heat enough in it to be valuable for commercial purposes, and that can be sold in competition with coals—with the ordinary coals.

Q. That is the coal as shown by the samples that you took?

A. By the samples of the coal and the evidence in the bed.

Q. You examined this mine with the particular object in view of ascertaining whether or not it was a mine that could be successfully used in the operation of railroads?

A. For the supply of fuel for the railroad, and for the supply of the trade along the line of the railroad.

Q. And in your report you called attention particularly to the fact that it could not be successfully used to burn in locomotive engines?

A. Yes, sir.

Q. And you make no reference to the fact that it is not valuable for other purposes?

A. I said it was absolutely without value, which covers everything that could come in. (Forrester's deposition, Tr., Vol. 1, page 98.)

This evidence is chiefly interesting because it so plainly indicates how pronounced an expert may be upon his theories, and how completely such theories may sometimes be disproved by the facts.

The evidence clearly establishes the fact that the coal has commercial value despite Mr. Forrester's opinion. Mr. Miller, a witness for the plaintiffs, testified:

"Q. Now, do you supply and have you always been able to supply the coal furnished to the Salmon River vicinity?

A. No, we have not.

Q. That is, you mean you have not been able to supply enough?

A. No, we have not supplied enough, we have been behind in our orders.

Q. Have you been able to receive orders for all you have been able to supply?

A. Well, during the summer months it has been, but during the winter months we haven't never filled our orders.

Q. Then you have been able to sell all you have supplied since you have been superintendent of the mine?

A. Yes, we have sold all that we have mined. (Tr., Vol. 2, pages 284 and 285.)

He further testifies

Q. I will ask you this question: Is the coal that you mined from that mine, when sorted, good merchantable coal?

A. Well, we have burned it at home and it has given us very good satisfaction. Of course it doesn't compare with a great many other coals—good coals, but nevertheless it does very well, and there is lots of heat and considerable fixed carbon and volatile matter, and it makes a very good domestic fuel, particularly in our locality. We are well satisfied with it. (Tr., Vol. 2, page 287.)

Mr. King states that the people are "simply crying for coal, and no complaints whatever as a merchantable fuel." (Tr., Vol. 2, page 384.)

The tone of Mr. Forrester's testimony indicates a prejudice which destroys, in a measure, its value as expert evidence. He presents charts which illustrate the results of his investigation as to the quality and quantity of the coal material, but it is clear from Mr. Miller's testimony that these charts purporting to show the vein in the mine in May, 1909, show a cross-section at a place in the tunnel where development work was being done, and at a most unfavorable place for a determination of the real nature of the coal vein.

In other words, according to Mr. Miller, Mr. Forrester's charts and maps are not a fair representation. (Tr., Vol. 2, pages 367 and 368.)

That Mr. King up to October 30, 1907, had sold (as he states in his letter), 450,000 pounds of coal, is not disputed, nor that up to December 19th he had sold over 500 tons. It is not disputed that hundreds of

tons were sold prior to the time that the contract was entered into, and it is not disputed that the railroad company is now using 150 tons each month, and that the people of Salmon City generally rely upon the product from this mine for their coal supply, and during the fall of 1909 in the three month period between October 1st and January 1st, King mined and sold over 500 tons. (Tr., Ex. G., pages 440 to 450.) Now, what does Mr. Forrester's testimony amount to in the face of such evidence? The coal was sold at $6.00 per ton, which unquestionably establishes that it is not "absolutely without value," and it is further stated in the testimony of Mr. Miller (Tr., Vol. 2, pages 282 and 283), as well as by the admission of Mr. Richards, that the demand was such that while they were driving the tunnel they were unable to fill the orders. It is also shown by the proof that there is an unlimited supply of this material, for which a steady demand exists.

As to the Output of the Mine.

The plaintiffs complain that the defendant King represented to them that during the eleven months prior to the time the contract was made he had mined, and sold to the people living at Salmon City, 2300 tons of coal, and that in addition he had supplied 300 tons to the Copper Queen mine. They contend that this representation was false, and that Mr. King had not produced and sold to the community of Salmon more than 700 tons, and not more than 25 tons to the Copper Queen mine. They also claim that this representation was an inducement, and one of the principal inducements for entering into the contract. Mr. Richards testifies

that the statement concerning the output of the mine was made by means of a telegram which Mr. King sent him while he was in New York. (Tr., Vol. 1, pages 126 and 127.) This telegram was, according to Richards, lost in a stolen grip. King does not deny having sent a telegram representing the output of the mine, but he says that the telegram contained the statement that *about* 2300 tons had been produced. (Tr., Vol. 2, page 381.) Richards and Lamborn also state that King repeated this representation when they were at Salmon in July. This, however, is denied by Mr. King, who states that while it is true that during the time that negotiations were pending at Salmon there was considerable talk what would likely be the earnings of the mine, and concerning what amount it would probably pay interest on, that he never at any time made any other statement concerning the tonnage, except as contained in the telegram. (Tr., Vol. 2, pages 381 to 388.) Mr. King stands by the statement which he made, and contends that it is correct; that is, that he did produce about 2300 tons; which amount, however, included what was furnished to the Copper Queen mine. It is true that Mr. King states that his estimate was only an approximation from the amount of coal that was being taken from the mine, but he considered then, and still considers that the estimate was a fair one. However that may be, it is incumbent upon the plaintiffs in this case to prove the falsity of this representation whether Mr. King said 2300 tons or about 2300 tons. It is not necessary for the defendants to prove that such amount was actually produced and sold unless the plaintiffs have produced evidence which makes a *prima facie* case

that such amount was not produced. Now let us inquire what proof they have offered to establish that this representation was false. It appears from the evidence that Mr. King took charge of the mine about the first day of September, 1907 (Vol. 2, Tr., page 398), and that he operated the mine continuously up to the first day of August, 1908, when Mr. Richards took charge, a period of eleven months. After Richards became manager and had operated the mine until the month of March, 1909, he found certain stubs or weigh checks. These stubs or weigh checks were not introduced in evidence. They bear date from November 15, 1907, until July 15, 1908, and plaintiffs make the claim that they show that only 585 tons were produced during that period. Mr. Richards, in whose possession these stubs were from March up until the time of the hearing, did not pretend to testify that they were all the stubs of coal weighed at the mine, and Mr. Miller, a witness for the plaintiffs, was careful to state with reference to plaintiffs' Exhibit "K," (the weigh stubs):

A. These look to me to be the stubs of some weights that I—

Q. These are the stubs upon which you placed the weights that you took?

A. Placed the weights that I took, yes.

Q. Then the figures shown on these stubs are the weights that you placed there as they were weighed from day to day?

A. Yes, but a great many of them—there are some that I could not have put there, and—

Q. These are the regular stubs that were kept there

by the company under your supervision. Whatever was sold or delivered of the coal there the weights were put upon these stubs as above?

A. They were put upon there, yes.

MR. CLARK: May I examine him as to his competency?

MR. RICHARDS: Sure.

MR. CLARK:

Q. Mr. Miller, have you anything from which you can tell whether or not these stubs as shown here to you by Judge Richards, contain the weights of all the coal that was delivered from your mine during that time—the time of which you were superintendent?

A. No, I cannot say that those are all the stubs, no.

Q. Was all the coal weighed at your place there?

A. No, not all of it.

Q. Where was some of it weighed?

A. Down at Chet Gibson's livery barn, and Mr. Kingsbury's barn, two places.

Q. Then the stubs of the coal that was weighed there wouldn't be here, would they?

A. No, they wouldn't be there.

Q. And you have no way of knowing how much that was?

A. No, I wouldn't. I didnt pay any attention to that.

Q. Then these stubs, in so far as they show the weights of coal from that mine, are only the stubs that were connected there with the mine?

A. Yes, sir, those were some that were in the office.

Q. You don't know whether those are all the stubs or not?

A. I couldn't swear to it, no.

Q. As a matter of fact they are detached, aren't they?

A. Yes, sir.

Q. Whose possession have these been in? Where did they come from?

A. They were up in the office.

Q. Did you bring them down with you?

A. No, Mr. Richards took them from the office while he was manager there.

Q. And they have been in his possession since then?

A. In his possession, yes.

JUDGE RICHARDS:

Q. About what quantity was measured or weighed down town in proportion to the amount weighed at the mine, if you remember?

A. Why, I couldn't exactly state that.

Q. No, not exactly, but generally?

A. I wouldn't hardly attempt to make a general estimate because I was at the mine all the time.

Q. I wish you would examine this exhibit and see if the Kingsbury and other weights are not all there as well as weights at the mine?

A. I am positive that the weights that Mr. Kingsbury gave us for the coal are not in here.

Q. They are not in there?

A. Yes, sir.

Q. What makes you positive of that, Mr. Miller?

A. Because Mr. Kingsbury never had any books. There were no books like this printed at that time. These books were printed just about the time we were

ready to weigh the coal ourselves at the mine. (Tr., Vol. 2, pages 262 to 264.)

Again he testifies:

That all the coal was taken from the mine prior to November 15th was weighed at other scales down town. (Tr., Vol. 2, page 265.)

Later on he has this to say:

Q. And isn't it true that as mines develop, of that character, that you mine in the summer time for the purpose of storing your coal and having an increased tonnage for the winter season?

A. That is usually done, yes, in coal mines.

Q. You never had done that in this mine before?

A. No, we haven't.

Q. There was some stored before you took this mine —or before these stubs introduced here in evidence— before you got your scales up that year—wasn't there?

A. Yes, there was some, as I understand it—as I remember it. (Tr., Vol. 2, page 363.)

Again:

Q. How much had you stored?

A. Why, we never stored any except what we had in the chutes outside.

Q. About five tons?

A. Yes, sir—except I might qualify that by saying that previous to and about the time that I first took hold of the property there was some put in storage at the school house, and some at Shoup's and at the Sheehan Hotel, for winter use. (Tr., Vol. 2, page 365.)

The foregoing is practically all of the evidence concerning the output of the mine.

The nature of the proof submitted as to the falsity of the representation of Mr. King as to the output of the mine is not such as to entitle it to very much consideration. In regard to the amount mined and sold about Salmon, the plaintiffs offer only partial proof. It is undisputed that the stubs do not cover the entire eleven months, and it is not shown that the weigh stubs produced are all the stubs for the period between November 15th and July 15th. It is undisputed that for the other portion of the eleven months a great deal of coal was mined, and some stored, concerning the quantity of which the plaintiffs offer no proof whatever, except King's letter of December 19, 1908, to the effect that over 500 tons (how much over we are not informed) had been produced up to that time. Then as to the allegations that 300 tons was not supplied to the Copper Queen mine they place upon the stand a witness who was at the mine only about four months, without any attempt to show what was furnished after he left. Is the proof offered convincing? Is it complete or sufficient? Does such proof justify the exercise of the extraordinary powers of a court of equity to set aside the written obligations of the parties?

Nature, Quality and Degree of Proof Required.

What does the law require as to the nature, quality and degree of proof in these cases, and what does it say concerning the right of a party to have a contract cancelled when he has made an investigation for himself of the property which he says he was fraudulently induced to buy?

"Cancelling an executed contract is an exercise of the most extraordinary power of a court of equity; the power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations unless their falsity is clearly proved, and unless the complainant has been deceived and injured by them."

The Atlantic Delaine Co. vs. James, 94 U. S., 207; 24 Law Ed., 112.
Union Railroad Co. vs. Dull, 124 U. S., 173; 31 Law Ed., 417.

"The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof: First, that the defendant had made a representation in regard to a material fact. Secondly, that such representation is false. Thirdly, that such representation was not actually believed by the defendant, upon reasonable grounds to be true. Fourthly, that it was made with intent that it should be acted on. Fifthly, that it was acted on by complainant to his damage, and sixthly, that in so acting on it the complainant was ignorant of its falsity and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as exist merely in an expression of opinion or judgment, honestly entertained; and again (excepting in peculiar cases) it excludes statements by the owner or vendor of property in respect to its value."

Southern Development Co. vs. Silva, 125 U. S., 247; 31 Law Ed., 678.

"Plaintiff must allege and prove what the misrepresentations were, that they were false, that he believed them to be true, and that he relied and acted upon them."

Grentner vs. Fehrenscheid (Kan.), 66 Pac., 619.
Gillispie vs. Fulton Oil & Gas Co., 86 N. E., 219.
Prentis vs. Crane (Ill.), 84 N. E., 916.

"The evidence adduced to set aside a written instrument for fraud, must be clear, unequivocal and convincing."

Martin vs. Noble, 157 Fed., 506.

"A party seeking the rescision of a contract on the ground of misrepresentations must establish the same by clear and irrefragable evidence."

Farnsworth vs. Duffner, 142 U. S., 43; 35 Law Ed., 931.

"If there is one proposition of law regarding the rescision of contracts, and the cancellation of muniments of title that is established beyond doubt or cavil, it is that the complainant must establish the essential facts of his cause of action with clearness and decisiveness to entitle him to relief."

Marsh vs. Cortis, 150 Fed., 121.

"To authorize a court of equity to set aside a contract for fraud, such a case must be made out as would authorize a jury to convict the defendant of obtaining property under false pretenses."

Fairchild vs. Dement, 164 Fed., 200.

See also:

Cyc., Vol. 6, page 336, and notes.

So much as to the nature, quality and degree of proof required.

While the plaintiffs charge that a certain representation was made as to what had been the output of the mine, in reality their principal concern in purchasing the mine was to ascertain that it was a valuable property which contained sufficient quantities of coal to justify expenditure in its development, not only for the present trade purposes, but also for the anticipated benefit to be derived from the advent of the railroad. It is idle to contend that the plaintiffs went into this transaction simply upon the statement of Mr. King as to what he had produced, or what he had supplied. The question which concerned the plaintiffs, and about which they altogether satisfied themselves was: "Had Mr. King a coal mine of sufficient extent, and containing a quality of coal suitable for the trade in and about Salmon, and such as might be relied upon to accommodate said trade and future demands expected ultimately to arise from the development of the country?" This was really the concern of the plaintiffs. As stated by Mr. King:

Q. Now, Mr. King, it appears that in this case complaint is made of certain representations you are alleged to have made. I will ask you first, what, if any, representations you made as to the tonnage of this mine?

A. Well, the first representation that was made on that was in answer to a telegram, I think, that I got from Mr. Richards. I haven't got the telegram because nearly all of our telegrams there in Salmon were repeated over the telephone, and we have to sort of make copies of them ourselves. Sometimes they send them over, and sometimes they don't, but the request was sent to me by telegram for the estimated production of the mine for the past year, and I answered that, about 2300 tons. That was to the best of my knowledge and belief.

Q. Now, when Mr. Lamborn and Richards came to Salmon did you have any further talk concerning the tonnage?

A. Only at the time of the figuring on the issuance of bonds. Mr. Lamborn—

Q. Was that before or after the agreement had been entered into, or before or after—

A. Well, it was the same morning, on the same day that the agreement was entered into.

Q. Well, go ahead and state what transpired there at that time?

A. Well, they were figuring that providing the tonnage for the coming year would amount to so much, and the expense of running the property to so much, why we would be justified in issuing $80,000.00 worth of bonds at six per cent, making an interest bearing indebtedness of $4800.00, which would be amply repaid by the income from the property. That was Mr. Lamborn's figures that he made on it, and it was used in order to persuade me to consent to the issuance of these bonds. The remark was made by Mr. Richards in my presence that

if the property didn't earn that money, it wouldn't hurt us to put up the interest temporarily until the property did pay it.

Q. Was anything said about the fact as to whether or not this mine would pay just at that time?

A. The main drift of their conversation with me, and over the issuance of the bonds, was to the effect that if the property held its own for the first few years, we could well afford to wait for a railroad and then make the big money out of the property. (Tr., Vol. 2, pages 381 and 382.)

Richards first states that he does not remember whether before the contract was signed he asked King for permission to inspect the weigh stubs, and afterwards states that he *probably* did make such request some time in July, but that he wasn't "particularly anxious." (Tr., Vol. 2, pages 250 and 251.) And again Richards asked Miller about the tonnage, but cannot recollect what Miller told him (Tr., Vol. 1, p. 164), so that, as we have already stated, this particular question as to the past production of the mine was not considered material, and it is reasonable to conclude that the plaintiffs were not specially concerned as to what the output had been; their principal concern was as to the nature and extent of the property and the prospects of an increased demand for the product. Here was the real inducement for their investment and when they had satisfied themselves upon this point, they were content to spend their money. Is it reasonable to suppose that this New York sugar broker and this mine promoter would not have demanded an in-

spection of the weight stubs to verify King's statement, if it was upon the past production of the mine they were to base their investment of $40,000? And again, Richards, while he had the property and was doing only what he calls development work, admits that the output was about one half of 2300 tons. (Tr., Vol. 1, page 201.) If the mine produced one-half as much as Mr. King represented during the time Richards was working it in his desultory fashion and doing development work, this is strong evidence that King's statement as to the 2300 tons was literally true. Here were two men experienced in business transactions contemplating an investment of $40,000.00, and which investment they now claim, was induced by an oral statement of the vendor as to the output of the mine during a certain period, but notwithstanding exact information as to past production was of vital importance (so they now insist), Lamborn never asked permission to look at the sales stubs, and Richards while stating that he *probably* asked for them in July admits that he was not "particularly anxious" to inspect them, and besides, he does not come into court with any accurate information as to what the mine produced while he was manager. Were they not guilty of inexcusable negligence?

In Adams vs. Smelting Co., 130 U. S., 643, 32 L. Ed., 1054, the plaintiff purchased from defendant a lot or tract of ground upon a positive representation that defendant would put him into immediate possession When he attempted to enter he found the lots in the possession of a third party, who refused to vacate for

a period of four years. Plaintiff sued for the rental value upon the ground of deceit. The Court, discussing the basis of the plaintiff's claim, says:

"To this ground of complaint there are two obvious answers. In the first place, the plaintiff could have required the delivery of the possession of the land to accompany the payment of the money. The lot being in the town might have been readily reached, when the ability of the company to give possession could have been at once determined. The plaintiff alleges that he used all diligence in his power to find out whether the representations of the officers, agents and attorneys of the company were true or false, but the inspection of the premises, the most natural and obvious mode of ascertaining whether they were occupied by another, does not seem to have been resorted to. The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity; nor will industrious activity in other directions, to the neglect of such means, be of any avail."

The concluding statement of the Court in the foregoing quotation applies with special force to the plaintiffs in this case. Does not their neglect to ask King to produce the stubs showing actual weights of coal not only estop them from claiming to have been deceived, but also prove beyond question that it was their understanding of the character of the property itself,—the extent and permanency of the coal supply—and the prospect of future profitable development which satisfied these parties with their investment and which induced them to make it? Even the manner in which Richards directed how the work at the mine should be

done is strong proof that he cared little about what the mine had produced; and there is no evidence that he did anything to stimulate the demand. Any well informed person knows that the amount of an article of this kind that can be sold depends somewhat in being in shape to furnish it, and in addition some effort to sell. He was not interesting himself in an endeavor to produce as much or more than he says King claimed to have produced; he was not attempting to pay interest on $80,000.00, the agreed value of the property; his sole desire was evidently to prepare the property for the future. It is strange, to say the least, that if the plaintiffs entered into the contract because of King's representations as to past production and because they were thus assured of six per cent on their investment, that as soon as they acquired control they lost all concern for immediate profit or income on their investment, and were interested only in developing the property—regarding the matter of immediate production and sales of coal as of secondary importance. Richards admits that in addition to his failure to work the mine to increase the output of coal, he was absent from it for two months, that is, from September 20th to the middle of November (Tr., Vol. 1, page 200), when if their investment was made on the basis of immediate returns he might have shown a more earnest desire to make the mine pay by giving it his personal attention. He also admits, that the winter was mild and that during December, which was after his return, they were behind on their orders (Tr., Vol. 1, page 208), which is confirmed by Miller. In fact, Rich-

ards made a very feeble effort to take out the tonnage which the plaintiffs assert was necessary in order to realize the six per cent on the investment.

All these circumstances bear out the conclusion that the representation as to what the mine had produced was not regarded by the plaintiffs as material; that they did not rely upon it as the inducement for entering into the contract, but that the real inducement was their understanding of what the mine itself was so far as the extent, quality and permanency of the coal vein was concerned and what the prospects offered for the future by way of demand for coal from the railroad company, and an increased demand generally which would arise from the growth of the community.

Now, if as the evidence plainly indicates, the inducement for the investment was the property itself as a coal deposit and not the mere estimate of King as to the quantity theretofore mined, they certainly have no cause for complaint on the ground that they were deceived concerning the property, for Richards states that there is nothing the matter with the mine, that there is plenty of coal (Tr., Vol. 1, page 208), and Lamborn states that he had the coal analyzed and knew its quality (Tr., Vol. 2, pages 317 and 318.) Lamborn states also that he told Mr. Shoup of Salmon about the tonnage Mr. King estimated, and this was before the sale, and Shoup stated he was "very much surprised." (Tr., Vol. 2, page 316.) If Lamborn considered tonnage material this should have warned him.

In the face of the evidence, the claim of the plaintiffs

that they relied upon the statement as to past production is entitled to little consideration. We may safely assume that Mr. Richards after he had failed to dispose of the bonds concerning which he had had some correspondence, on account of such failure decided to throw up the deal. (Tr., Vol. 2, pages 243 and 244.) He tells his trusting and confiding friend Lamborn that the mine won't pay, when in fact he never attempted to work the property to its full capacity or for any other than development purposes, and Lamborn in effect says "all right, Richards, if you say King's statements were false I say so too."

In conclusion upon this feature of the case, we submit that the evidence does not show that Mr. King made any definite statement as to the quantity of coal produced; that assuming that he did positively fix the quantity at 2300 tons, the plaintiffs have not proved the statement to be false; that if King did make such representation and it was material and was false, plaintiffs cannot assert that they have been injured when they failed to exercise ordinary business precaution to verify the representation; that even if King did make the representation plaintiffs did not rely upon it, but were induced to purchase because of what they found the mine to be as a permanent, valuable coal deposit, sufficient in extent to justify expenditure for development with the expectation of reaping reward with the advent of the railroad; that the evidence does not show that plaintiffs suffered any damage for they admit that they did not work the mine in an endeavor to pay the interest on the investment (but simply for

development purposes) notwithstanding there is plenty of coal in the mine and a demand for it which they failed to supply.

As to the Quality of the Coal in the Old Room.

As to this feature of the case the allegation in the bill is as follows:

"That the defendants stated and represented that the entire breast of what was known and designated as the 'old room' in the workings and excavations on said property was clean coal, and did not require any sorting, and was the same strata as the upper strata then exposed at the breast of the new entry."

The trial Judge decided that this allegation had not been proven, yet we desire to again present our view of the evidence relating thereto.

The face of the "old room" at the time the contract was signed was 254.76 feet further in the hill than the face of the new entry, and the witnesses agree that this "old room" could not then be inspected because of a cave-in and because of bad air. There were two distinct stratas in this vein of coal which were in plain view in the face of the new entry and the plaintiffs complain that Mr. King represented to them that the entire breast of the "old room" was the same strata as the upper strata in the new workings, and was of such quality that it did not require any sorting. They also claim that this representation was false. To quote from Mr. Richards' testimony:

Q. What, if anything, did he say in reference to the

breast that you could not see being the same layer as the one you could see—the lower layer?

A. The lower layer in the old breast we couldn't see, and he had never seen it; but we could see it.

Q. I am asking you what he said, Mr. Richards?

A. Well, that's what he said.

Q. Well, tell us then what he said in reference to these layers being the same or not?

A. Well, he said that the upper strata in the new—in the old entry—

Q. Now which do you mean, new or old? You said both.

A. Well, he said the old entry was the same as the upper strata in the new entry.

Q. Now what do you mean by upper strata in the new entry?

A. The portion above the clay.

Q. What is the character of that?

A. It was worthless.

Q. What do you mean by the lower strata in the new entry?

A. The portion from which they were taking their coal at that time.

Q. What is the character of that strata?

A. It was coal that they sorted and delivered to the people at Salmon.

Q. Then what did he say with reference to the breast

which you couldn't see being the same or not as the lower strata which you could see?

A. That the lower strata was unknown in the new entry—in the old entry.

After a still more labored attempt to obtain from the witness a statement as to just what Mr. King's representation was, the witness finally answered:

Q. Well, is that all he said?

A. And that the lower strata was unknown—the lower strata that was shown in the new entry was unknown in the old entry, the breast of the old works. (Tr., Vol. 1, pages 143 to 145.)

On cross-examination Plaintiff Richards makes another attempt to state Mr. King's representation with regard to the face of the breast in the "old room." To quote:

"Mr. King stated that the upper strata of the new entry was the same as the mine—as the vein from which he had mined in the old works—the old face." (Tr., Vol. 1, page 220.)

And he subsequently explains this as follows:

"What was meant, Mr. Clark, was that the upper portion of the vein in the new entry, which showed in the new entry to be waste, had increased in quality until at the breast from which Mr. King had mined the year before, it was good coal—clean and unsortable coal.

Q. In other words, he told you that the upper strata in the old breast which had been the same as the upper

strata in the new breast, had gotten better to such an extent that it could be mined for merchantable coal?

A. Yes, sir. (Tr., Vol. 1, pages 220-221.)

Mr. Lamborn's version of Mr. King's representation varies somewhat from that of Mr. Richards. Lamborn states:

Q. What statement did he make relative to the workings that you were not able to investigate because of the bad air—

A. I called Mr. King's attention to the upper vein, and he told me that in the old workings the quality of the coal was exactly like they were delivering in town, and that it didn't need sorting. At that time they were not delivering, but he said there was some in the bins, and we examined that.

Q. What did he say as to the face of the breast you couldn't see being that kind of coal?

A. He said it was clean coal. He said the whole breast was 5½ feet of clean coal; he pointed out the fact that as we went into the tunnel the seams became wider and wider; he said they eventually would come out in the same way that they had in the old workings." (Tr., Vol. 2, page 300.)

It will be noticed that according to Mr. Lamborn, the representation was that the coal was *exactly like they were delivering in town*, and that some of this coal was at that time in the bins. The plaintiffs were at liberty both from an inspection of the breast from which the coal was being taken for delivery, and from an inspection of the samples of this coal in the bins, to judge for themselves as to the necessity for the sorting of the coal

in the old workings which, as Lamborn says, King stated was exactly like that which plaintiffs were able to see.

In order that the statements of all parties, as to just what representation was made with respect to this old room, may be considered together by the Court, we quote Mr. King's testimony:

Q. Some complaint has been made as to some representation as to the coal in the old workings, or breast of coal in the old workings, I will ask you to state what, if any, representation you made in regard to that?

A. Now, I don't remember making any particular representation with regard to the coal in the old workings, except that it was better in the old workings than it was in the new workings.

Q. Was that the only representation you made in regard to it?

A. Entirely. That was the only representation that the coal would improve as we went in on it, and that it was a great deal better inside than it was there at the first 200 feet that I understand Mr. Lamborn saw.

Q. Was that representation true?

A. It was—the facts have borne it out. (Tr., Vol. 2, page 383.)

Again he testifies:

Q. Did you make any representations as to the sorting of the coal in the old vein.

A. I never told Mr. Richards or Mr. Lamborn that that coal would not need sorting. I told them the coal would get better, and it has got better; and people

today, from the output from the very place they couldn't get at, where we are taking the coal today, they are simply crying for the coal and no complaints whatever as a merchantable fuel. (Tr., Vol. 2, page 384.)

From the foregoing testimony the Court must reach its conclusion as to just what representation Mr. King really did make. We gather from Mr. Richards that Mr. King represented in substance that the upper strata of the new entry improved in quality until farther in the hill, where it had been reached in the "old room" it was good clean coal, and from Mr. Lamborn's statement we are warranted in concluding that Mr. King represented that this clean coal in the old workings was the same quality as that coal in the new entry from which the supply for the town was being mined. The most that can possibly be made out of Mr. King's statements concerning this matter as related by the plaintiffs is that as the work progressed, the quality of the coal improved, became cleaner and the vein of greater width. We think this is a fair construction of the evidence. As to the particular element which plaintiffs attempt to inject into the case that the coal did not require sorting, we think that is almost unimportant, when we consider the statement of Lamborn himself that King stated that the coal in the old workings was the same as that being mined, samples of which were in the bins, which plaintiffs must have understood to mean that the coal in the "old room" did not require sorting only in the sense that the coal being mined did not require sorting, the two being of *exactly the same character.*

The statement of the Court in the case of Southern Development Company vs. Silva, 125 U. S., 247; 31 Law Ed., 678, is a very apt suggestion, applicable to this case, showing why the plaintiff's evidence was not sufficient to warrant cancellation. To quote:

"It is thus seen that the evidence on this material point does not clearly establish the fraudulent representations of Silva as claimed by the complainant; but that, on the contrary, the material facts and circumstances as disclosed by the record are entirely compatible with the theory that Silva did not make the representations charged against him, or at most, that he merely gave expression to an opinion as to the extent of the ore body, erroneous though it proved to be. This would not constitute fraud. In the language of the court below: 'This testimony was taken in June, 1886, about two and a half years after the conversations took place. They were present at the time examining the mine and engaged in conversation for an hour or more. These discrepancies in matters of detail during a long conversation, related by different parties, viewing the subject from different standpoints after the lapse of so long a period of time, are no more than might reasonably be expected even in honest witnesses. There is no occasion to impute any intention to testify falsely to either. * * * Parties are extremely liable to misunderstand each other, and, in looking back upon the transaction in the light of subsequent development, are prone to take the view most advantageous to themselves."

Now, assuming that we have reached a fair conclusion as to just what Mr. King's representation amounted to, let us see how far he misled these parties with reference to the quality of coal in these old workings. In

describing what he saw in the "old room" when the entry was made from the new workings to the old during the month of January, Mr. Richards states:

"I saw the room—the main room from which Mr. King had been extracting coal the year before we took charge, and I found a breast of five feet or more of coal that was not clean coal, but had to be sorted the same as that which we had been working since we had taken charge." (Tr., Vol. 1, pages 147 and 148.)

Here is proof from Mr. Richards himself that King's statement as Mr. Lamborn understood it, was true.

He further states:

"The breast that we found in the old workings was the same as the lower strata in the new workings. That is what we found."

Q. Now, what was the character of the lower strata in the new workings?

A. It was much better than the upper works—than the upper strata. (Tr., Vol. 1, page 152.)

Here is further proof that the coal in the old workings was the same as that which was being mined from the new workings at the time the contract was entered into. That is the quality of coal Lamborn says King stated would be found in the "old room." On cross-examination he has this to say:

Q. Now, when you got into the old breast and found what there was there, what did you find?

A. We found a room there that showed a breast of five feet or about five feet of this coal.

Q. Horizontal or—

A. Well, the thickness of the vein.

Q. It was about five feet?

A. About five feet, yes.

Q. And how high was it up and down?

A. Well, the thickness of the coal vein would represent the height.

Q. Of the tunnel?

A. Of the room. Of course the room was broken. I suppose it might have been six feet.

Q. Well, now, there was five feet of thickness there, wasn't there?

A. About that, yes.

Q. Of coal?

A. Yes.

Q. And how many stratas was in it?

A. Oh, I couldn't say as to the number of stratas; there was a great many stratas.

Q. And it was just about the same kind of coal as you met with in the new workings?

A. Yes, the lower portions might have increased a little in value, not much. It wasn't as large, I think, as we had gone through a couple of hundred feet back.

Q. Well, it was a better vein for the purpose of producing coal, wasn't it?

A. It was a very good vein from which to mine coal. (Tr., Vol. 1, pages 221 to 222.)

Mr. Miller, a witness for the plaintiff, testifies:

Q. Taking the breast that has been mentioned here as the one which they couldn't see when Mr. Lamborn was there, what was the character of that coal in that breast?

A. The character of the coal in that breast—well, it was better than the coal in the main entry which Mr. Lamborn saw.

Q. It was better in what respect, Mr. Miller?

A. It didn't contain the sand.

Q. What is the entire width made up of, in a general way?

A. In the breast that Mr. Lamborn didn't see?

Q. In the breast that he didn't see, yes.

A. Why, there was a bone coal there probably from eight inches to a foot that was perfectly clean; and then there was a little clay seam of about two inches perhaps, and between the clay seam and the bone seam there was about a foot—the bone seam was probably about, oh, it varied all the way from two to four or five inches; then on top of that again we used to shoot off a layer of coal that was—that would be as high as about two feet—that is, it would run from not less than eighteen inches up to that; and then we got another very small clay band; and we got then a top coal that was about ten inches, and that was clean coal, and then on top of that we had a clay clod or seam—a band that was probably all the way from three to six inches.

* * * * *

Q. Now, how did that compare generally—the breast that he could not see, with the upper portion of the breast that he could see?

A. Well, it was more sandy; it wasn't as good a commercial coal.

Q. Which was more sandy?

A. The one that he could see.

Q. Well, about how would it compare in percentage?

A. Well, approximately I think that the coal in the breast was probably a third better.

Q. The coal in the breast that he couldn't see was about a third better than the coal he could see?

A. Yes.

Q. How did that breast that he could not see compare with the coal that you had worked and extracted?

A. Why, it never was as good as the coal that we had in farther. It always was more sandy until we got out of it. (Tr., Vol. 2, pages 269 and 270.)

Again:

Q. Do you call the breast of the opening which Mr. Lamborn could see, do you call that coal?

A. That is what we call it.

Q. How much of it is coal in your judgment?

A. Oh, if the clay bands were out of it, and clods it would probably be three and one-half or four feet of coal.

Q. Could you give us an idea of it in percentage?

A. Well, you could probably put it at 75 per cent.

Q. You think 75 per cent of the breast that he could see was good coal?

A. Yes, sir.

Q. What percentage had the breast he couldn't see?

A. About 25 per cent.

Q. 25 per cent?

A. Oh, that he couldn't?

Q. The one that he couldn't see?

A. Mr. Lamborn?

Q. Yes.

A. That was probably, maybe 85 per cent.

Q. Then you will say that those two breasts showed from 75 to 85 per cent of clean coal?

A. Yes.

Q. You are sure of that, are you?

A. Well, I feel pretty sure. That is, I figure like that; now the waste we threw out would run from 15 to 25 per cent of what we mine out of the mine. (Tr., Vol. 2, page 272.)

He explains later that in this new entry they mined only underneath what he calls the clod, which was about midway between the bottom and the top of the tunnel; so that the percentage of coal in the new entry must, of course, be taken to be the percentage of coal in the lower strata of the new entry. Concerning this lower portion of the new entry, he testifies:

Q. And how far was that clod from the bottom?

A. Five and one-half or six feet.

Q. Your coal or vein was five and one-half feet thick?

A. Five and one-half to six feet. (Tr., Vol. 2, p. 274.)

It will be recalled that the witness has testified that of this five and one-half to six feet there was three and one-half to four feet of good coal, or about 75 per cent. Now let us see what he states as to the thickness of the vein in the old works:

Q. What was the thickness of that vein at the breast that Mr. Lamborn couldn't see?

A. Well, it ranged along about five and a half to six or seven feet.

Q. Now what proportion of that breast did you mine for coal?

A. Why, we mined all of it up to the clod.

Q. And how high was that from the bottom, Mr. Miller?

A. From the bottom?

Q. Yes.

A. Well, that was all the way from five and a half to seven feet.

Q. Was it coal clear to the bottom?

A. Not clean coal all the way through; there was these clods.

Q. Did you mine it clear to the bottom as coal before sorting?

A. Yes, we run it all out.

Q. So that the width you mined in that face was about five and a half feet?

A. Five and one-half to seven feet.

Q. What was the relative proportions of waste in that breast compared with the breast he could see?

A. Well, it is just as I said—about ten per cent difference.

Q. A little better.

A. Yes, sir.

Q. That is, there is a little less waste?

A. There is less waste in it; yes, sir. (Tr., Vol. 2, pages 274 to 275.)

It is quite apparent that there was an improvement in the coal vein the farther the work progressed, and that the coal in the old workings was better in quality, and that there was more of it than in the new entry, and that Mr. King's representations were, as he states, borne out by the facts.

Even assuming for argument's sake that he made the statement that the coal did not require sorting, what proof have we that even this statement was false? Mr. Richards, who is the only one who attempts to prove the falsity of any of the alleged representations (Mr. Lamborn simply assuming that the representations were false because Richards told him so), states upon cross-examination that up to the time they took out the pillar between the new and the old workings whereby they were able to get into the old room, that the coal which had been supplied has been taken out of the new workings. To quote:

Q. And all of the output of the mine up until that

time was taken out of the face of the new tunnel that you had seen?

A. Yes.

Q. And from some time in December—about what time in December would you say?

A. Well, I wouldn't say—I couldn't say.

Q. Then you took out this pillar and then went on in the face of the new tunnel?

A. Yes, we kept the face of the new tunnel going all the time. (Tr., Vol. 1, page 224.)

Q. Then none of the coal that was taken out while you were there was taken from the breast of the old works?

A. No.

Q. To which Mr. King, you say, referred you?

A. That Mr. King had said was unsortable coal.

Q. None of it was taken from the breast of the old workings at all?

A. No. (Tr., Vol. 2, page 225.)

Again:

Q. You never saw any coal taken from the breast of these old workings?

A. No, sir, we never took a pound from there. I saw samples from there which Mr. King showed me. (Tr., Vol. 2, p. 226.)

In the face of this evidence, can it be said with reason that the plaintiffs have proven that this coal

did require sorting when they never mined any from the breast of the old workings?

As to this feature of the case we are convinced that the Court will not hold that the evidence shows any special representation with regard to the quality of coal in the old workings save that it was better coal than that which the plaintiffs saw when they inspected the mine, and we are also convinced that the Court will hold that such representations as were made were true. Or, stating it another way, we are convinced that the Court will hold that the plaintiffs have utterly failed to establish by their proof that Mr. King did make the representations as to the coal in the "old room" which they allege he made, or even assuming the contrary, it has not been shown that such representation was false; and we may add that it has not been shown that such representation, if false, was made with knowledge of its falsity. So far as the proof goes, it may have been made with full belief as to its truth. There is no evidence that Lamborn or Richards ever inquired of King whether he had ever personally inspected the coal in the "old room," nor is it shown as a matter of fact that King had inspected it. Whatever he represented may have been his conclusion based upon statements made by the miners or others who had seen the face of the old workings, if we assume that this representation was false we cannot presume that it was made dishonestly or recklessly. In Southern Development Company vs. Silva, 125 U. S., 247; 31 Law Ed., 678, the plaintiff claimed that defendant had represented to its agent that he had shown said agent "all the work that was

done in the mine that I knew anything of," but that in fact defendant had failed to point out certain drill holes in the sides of an ore chamber. The Court in discussing this feature of the case states:

"There is no direct evidence going to show who drilled the holes. There is nothing in the entire record to connect Silva with them, except the fact that he was the owner of the mine, and was in possession of it at the time when it is most likely they were drilled. But this circumstance should not outweigh the positive denial of Silva in his answer, and also his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish defendant's knowledge. Barret vs. Stanton, 2 Ala., 181; McDonald vs. Trapton, 15 Me., 225."

In this case we say, that there is nothing in the record to show King's personal knowledge of the quality of coal in the old breast except that he owned the mine at the time it is claimed the representation was made, and that this circumstance should not be sufficient to impute to him knowledge that his statement was false or that he made the statement with an utter disregard as to whether it was true or false, especially when both in his answer and in his testimony he positively denies that he made the representation at all.

We insist it has not been shown that King made the representation claimed; that assuming that he did, it has not been shown that plaintiffs relied upon it. Neither has it been shown that such representation, if

made, was false, or, assuming that it was false, that it was made with a knowledge of its falsity.

Plaintiffs Inspected and Examined the Property Prior to the Contract.

Under this heading we desire to discuss assignment of error numbered seven, and to call attention to the fact that the whole record shows that the plaintiffs did not rely upon the representations of Mr. King, whatever they were, as an inducement for entering into the contract. From their own testimony there is no room for doubt that they entered into the contract because they considered the property to be valuable not for what it had produced, but for what it was capable of producing to supply the trade in and about Salmon, and the expected increased demand which would arise with the advent of the railroad, and the future development of the country. And they satisfied themselves not from any statements of Mr. King, but from a personal examination of the property, from the testing of samples of the coal, from inquiries made of the superintendent of the mine, and the men at work there, and from inquiries made of the people residing in Salmon City, that the investment which they thought of making was a safe one, and throughout all the inspections and examinations of the property, Mr. King in no wise interfered to prevent or hinder them or even to influence them; they make no pretense or claim that he did. Let us look into the testimony that we may know what these men did before they decided to invest their money.

Richards had for years been interested in mining. He claims to be a mining engineer, and his business is investing in real estate and mines. (Tr., Vol. 1, page 152.) He is also a promoter; his business being to procure for sale properties of various kinds, and to find purchasers therefor. He had been in the business of leasing and operating contracts in Cripple Creek before coming to Salmon City. (Tr., Vol. 1, page 155.)

Mr. Richards visited the mine immediately after Mr. King had purchased it; he examined the coal vein in the Pollard workings; he discussed with Mr. King the permanency of the vein, and he testifies:

Q. And he (King) was asking your opinion about it?

A. Yes, sir.

Q. He asked whether you thought that was a good buy or not?

A. Yes, sir.

Q. And you told him if it was developed along the same lines that it looked all right to you?

A. Yes, sir.

Q. And you were very favorably impressed with it?

A. Yes, sir.

Q. Well, now, what was there about this mine that impressed you so favorably at the time?

A. The thickness of the vein.

Q. Where was this vein that was so thick that impressed you so?

A. Where Mr. Pollard was working.

Q. And that was in the Old Pollard workings, was it?

A. Yes, sir.

Q. Well, now, how thick was the vein at that particular place?

A. Oh, it was five feet or six feet. (Tr., Vol. 1, pages 159 and 160.)

After testifying concerning his visit to the mine with Mr. Lamborn in 1908 he was again interrogated on cross-examination and more particularly concerning his first visit when he went to the mine with Mr. King.

Q. You had seen this breast of the old workings yourself about the year before, hadn't you?

A. You mean when Mr. Pollard was there?

Q. Yes.

A. No, not that part.

Q. Well, when Mr. King took you up there?

A. I had been to Pollard's workings. It was practically the same room, but not nearly so far in.

Q. You had seen the breast of the old workings with the exception that it was not so far in?

A. Yes—by several hundred feet. (Tr., Vol. 2, page 225.)

Concerning a subsequent visit to the mine before Mr. Lamborn came from New York he testifies that he made inquiries of Mr. Miller and discussed his maps of the mine and workings. He does not remember whether he inquired of Miller whether the coal had to be sorted, or as to the tonnage from the mine; and this neglect indicates that they did not regard these

matters of primary importance, but that they were buying the mine because of what they saw from their inspection, and from what they considered the prospects to be for an increased production. He admits that his purpose there was to get all the information he could about the mine. To quote his testimony:

Q. And did you ask him (Miller) about this vein in the old workings?

A. Yes.

Q. And what was your object in that?

A. Well, I was interested in getting what information I could of it—in regard to it.

Q. That was your purpose there?

A. Yes.

Q. And you got what information you could about that mine?

A. Well—

Q. Wasn't that your purpose there, Mr. Richards?

A. At the mine?

Q. Yes.

A. Why, I wanted to see the mine; yes.

Q. You wanted to examine the mine and get what information you could out of it?

A. Yes, sir.

Q. Preparatory to purchasing it?

A. Yes; but I—

Q. And you had Mr. Lamborn there with you?

A. At one time, yes; when we proposed to close the deal.

Q. And at this particular time?

A. No, I was there several days before Mr. Lamborn came.

Q. And you were investigating the mine, were you?

A. Well, I was there, a time or two. (Tr., Vol. 1, pages 164 and 165.)

He admits that he was at the mine three or four times between the time he came back from New York and the time that Mr. Lamborn came to Salmon (Tr., Vol. 1, page 165); that he was there for the purpose of getting all the information he could, and that he thought he had all the information that he needed. (Tr., Vol. 1, page 166.)

Richards and Lamborn visited the mine in July; they went there with a view of purchasing the property; they talked with the persons who were at the mine; went into the mine; had free access to the property, and Mr. King was not there to in any way interfere with their examination. Mr. Miller was at the mine and they asked him such questions as appeared to them to be proper in making an investigation of the property; they asked him about the extent of the works, and he showed them the property; they also inquired of the citizens of Salmon concerning the character of this coal; saw some of the coal burned; saw the miners mining the coal, and saw the coal being taken to town by the residents of Salmon; talked to people to whom the coal was sold about how it burned, and

what they paid for it. And all this was done by Richards and Lamborn in pursuance of their plan to investigate the property, and to get all the information they could about it. (Tr., Vol. 1, page 215.) Richards states that they knew that all the coal coming out of the mine when he and Lamborn were there had to be sorted, and they expected to sort it. (Tr., Vol. 1, pages 211 and 212.) They knew that King was not an expert on coal mines, or on coal, and he did not pretend to them to be an expert. In fact, King had invited Richards' opinion as one able to pass judgment upon mining property, as to whether his (King's) investment was a good one. (Tr., Vol. 1, page 216.) Lamborn says he was practically dragged to Salmon by Richards. Richards has insisted that Lamborn come and inspect the property, and after his arrival they made as complete and thorough an examination as they desired in the absence of Mr. King and entirely free from his influence. They did not take Mr. King's word concerning this property; they went out and inspected it. (Tr., Vol. 2, pages 315 to 317.) Lamborn relied not upon King's word but upon what Richards represented and upon his own inspection of the property. This young mining engineer in whom Lamborn had such great confidence considered that he had a great proposition in hand, and Lamborn assures Richards that it is upon him that he (Lamborn) would depend. Notwithstanding this dependence upon his co-plaintiff, however, Lamborn to satisfy Richards came to Salmon to acquire a more complete satisfaction. These two unsophisticated gentlemen would have it

appear that they were two innocent, credulous, confiding and uninformed individuals who were duped because of some remarks made by Mr. King, and that the Court should not hold them in anywise responsible simply because they several times freely inspected and examined the property. Lamborn had had the coal analyzed before he left New York. (Tr., Vol. 2, page 318, also 322.) When he reached Salmon City he visited the mine on three occasions (Tr., Vol. 2, page 324), and went into the workings, and all over the outside surface. He states that he made no request of Mr. Miller for the stubs to ascertain what had been the output of the mine. (Tr., Vol. 2, page 316.) This appears to have been quite as unimportant to Mr. Lamborn as it was to Mr. Richards, who as we have shown, was also not "particularly anxious" to inspect the stubs. Mr. Lamborn testifies, however, that notwithstanding that his examination was not so complete as it might have been had he not been nervous, that he understood well enough when they purchased the mine that it was not the best of coal (Tr., Vol. 2, page 317), and that he judged that King didn't know anything more about a coal mine than he (Lamborn) did. In conclusion he states that he feels much chagrined because of his lack of judgment in this transaction, and admits that he handled it in a lax business way, but attempts to justify himself by adding that "it was a question of absolute confidence on the part of Mr. Richards and Mr. King." (Tr., Vol. 2, page 331.)

Such is the evidence of the conditions surrounding the transaction between plaintiffs and defendants. It is

clear that they relied upon their own inspection and investigation rather than upon the mere statement of Mr. King as to what the mine had produced (which they have not shown to be false) or upon his statement that the coal in the old room was "unsortable." We think the Court will not relieve the plaintiffs upon such a showing as is disclosed by the records.

Plaintiffs May Not Claim to Have Been Defrauded When They Investigated for Themselves.

"It is established by a beadroll of authorities to which there is no substantial dissent, that where a prospective purchaser undertakes to make, and does make an investigation of his own, and the vendor does nothing to prevent it from being as full as is desired, the purchaser cannot be afterwards heard to say that the vendor made misrepresentations which he relied upon to his hurt."

Pittsburg L. & T. Co. vs. Ins. Co., 140 Fed., 888.

The foregoing was an action for deceit, but the principle announced applies in this case.

"The third defense denies that the plaintiff relied upon the representations or statements made by Stratton, but on the other hand made its own examination of the property and acted upon the results of such examination; that full and ample opportunity was afforded the company prior to the conveyance of the property to inspect the books, papers, accounts, assay certificates, mill and smelter returns, etc., covering a period several years prior to the transfer; and that the plaintiff proceeded and acted upon information and facts derived

from sources other than from Mr. Stratton or his agents. I think the rule is well settled that in cases of this character to enable the plaintiff to recover, there must be false representations, and the purchaser must have purchased upon the faith and credit of such representations to his damage; and a defense which shows that a purchaser not only did not rely upon the false representations charged against the vendor, but availed himself of the opportunity afforded him to make the fullest examination, and did make such examination, and as a result thereof, purchased the property, if supported by proof raises an effectual bar to the plaintiff's case, and is a good defense. Southern Development Company vs. Silva, 125 U. S., 247; 8 Sup. Ct., 881; 31 Law Ed., 678; Crocker vs. Manley, 164 Ill., 282, 45 N. E., 577, 56 Am. St. Rep., 196; Weist vs. Grant, 71 Pac., 95; Van Well vs. Winston, 115 U. S., 228, 6 Supt. Ct., 22; 29 Law Ed., 384."

Stratton's Independence vs. Dimes, 126 Fed., 968, 988, 978.

In Farrar vs. Churchill, 135 U. S., 609, 34 Law Ed., 246, the complainant sought to enjoin the enforcement of a contract for the payment of the purchase money due on land, and to recoup damages suffered, because of fraudulent representations. The land was purchased upon an express representation as to the number of acres under cultivation, and as to the number of acres "above overflow" from the Mississippi river, and in making the purchase the plaintiff had expressly stated that he did so because of these particular representations. It appears, however, that prior to the purchase he visited the plantation with a view of inspecting it, and was taken over the property by the party in

charge, and the Court held that he could not escape liability. To quote:

"The general principle applicable to fraudulent representation are well settled. Fraud is never presumed; and when it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact; must be false, and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause if it were proximate, immediate and material. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendors' representations."

See also:

Shappiro vs. Goldberg, 192 U. S., 232; 48 L. Ed., 419.

Southern Development Company vs. Silva, supra.

Slaughter vs. Gerson, 13 Wal., 379, 20 L. Ed., 627.

In Smith & Benham vs. Curran & Hussey, 138 Fed., 150, the defendants sought to escape obligation under a contract on the ground of false representations inducing the execution of it. It was shown at the trial that they had made an investigation concerning the work to be performed and obtained all information for which they made request. We quote from the opinion:

"Taking up first the question of the defendant's liability upon the facts so found, before discussing the subject of damages, it is idle to argue that the agreement is invalid because it was induced by fraudulent misrepresentations on the part of the plaintiffs. However widely divergent the conditions, on which the success of the enterprise depended, are found to be from what was represented in the discussion between the parties leading up to the agreement, the defendants, through Curran, who went upon the ground and was given all the information asked for, undertook an independent investigation, after the preliminary or provisional agreement, and before entering into the final one, and by that they are bound. It does not matter that this was not thorough, although a month was given to it; or that it failed to develop the discouraging features which subsequently appeared. Every opportunity was afforded to make it as full as was necessary, and there were many things, such as the flow and fall of the stream, the character of the country to be traversed, the distance (which is now complained of as some three miles more than was stated), and the elevation and lay of the land, which were apparent to the observation of any one, and presumptively much better understood and appreciated by the defendants, with their technical engineering training, than by the plaintiffs. There is no pretense, and certainly there is no evidence, that the plaintiffs did not honestly believe and rely upon the representations made in the prospectus, by which they were apparently as much misled as the defendants; their confidence and good faith being shown by the large amount of money which they were prepared to advance. The most that can be said is that they ought to have known with exactness the truth of what was asserted in the prospectus before allowing it to be made the basis of nego-

tiations. But whatever might have been the result, had the matter rested there, the defendants, very properly, before going into a project of this character and magnitude, took time to look into it; and if they failed to inform themselves as fully as they might and ought, not having protected themselves by a warranty, they cannot now be heard to say that the agreement was entered into in reliance upon the representations of the plaintiffs, and that, these having failed, they are relieved."

In Farnsworth vs. Duffner, 142 U. S., 43, 35 L. Ed., 931, it is said:

"The neglect to make a reasonable examination will preclude a purchaser from rescinding a contract of purchase on the ground of false and fraudulent representations; he is also precluded when it appears that he did make such examination, and relied on the evidence furnished by such examination, and not upon the representations."

And Pomeroy in his Equity Jurisprudence at Section 892, declares that a person is not justified in relying upon representations: "1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or means of acquiring knowledge possessed by both parties."

The plaintiffs charge in their complaint and are very

careful to enlarge upon it in their evidence, that at the time of their negotiations with him, Mr. King was president of the First National bank at Salmon City and stood high in the social and commercial life of the city. They seem to suggest that for this reason King is the more responsible for his every expression, and that their own conduct in investigating the property should not count against them. This attitude of the plaintiffs is tantamount to an admission of negligence on their part for failing to require production of the proofs of the output of the mine, which neglect they seek to justify by the claim of implicit faith in King because of his high standing. In the Farnsworth-Duffner case, just cited, where a somewhat similar claim was made by the plaintiffs, the Court says:

"It is further charged in the bill that 'in order to induce said plaintiff to accept and confide in said representations as to the validity of said title, and in order to prevent the said plaintiff from making inquiries in other directions respecting the same, the said Daniel D. T. Farnsworth at the time of making the said representations respecting the said title, also represented to the said plaintiff that he, the said Daniel D. T. Farnsworth, had been governor of the state of West Virginia and a member of the senate of the same state, and was at the time of making such representations, president of a bank, and the president of a railroad company and a member of the Baptist church, and had theretofore built an edifice, which he pointed out to the said plaintiff, and that he was not such a man as would deceive or take advantage of the said plaintiff or would have anything to do with titles to land unless they were good titles.'

According to the plaintiff's testimony it would appear that these statements were made before the signing of the original contract. According to Mr. Farnsworth that while he did make statements of that character it was only after the contract was signed, and while walking about the city with the plaintiff, and in response to inquiries made by him. But, further, the testimony of Mr. Farnsworth is that these matters concerning himself thus stated were true, and there is no suggestion anywhere that they were not true. If they were true they certainly were not false and fraudulent representations, and if false they were not of a character to invalidate a contract. It would hardly do to hold that a party was induced into a contract by false and fraudulent representations because one of the vendors represented that he had been governor of the state, and was a member of the church and president of a bank and railroad company."

In this case it is not contended that to influence the plaintiffs to sign the contract and notes, King represented that he was president of the First National bank, or that he was highly respected in the community, and received in the best society, but plaintiffs allege that because they found King in this situation in Salmon, that they believed him more readily. Under the rule announced in the Duffner case if King had made these representations, and they were true (or even if false), plaintiff would have no right to complain. How much less reason have they for complaint when King did not attempt to impress the plaintiffs by reason of the high standing he had in the community, and when they, without suggestion from him, accorded his statements greater weight simply by reason of what they found his standing to be?

Proof as to Damage or Injury.

Under this heading we desire to discuss assignments of error numbered five and nine.

By reference to the bill of complaint in this case it will be found that there is no charge that plaintiffs suffered any pecuniary loss by reason of the misrepresentations. There is no charge that they were damaged, and there is nowhere in the evidence any attempt upon the part of the plaintiffs to show that they suffered any pecuniary loss or damage by reason of the alleged deceit. And at the time this case was argued in the trial court counsel for plaintiffs stated to the trial judge that the cause was tried upon the theory that it was unnecessary to allege or make proof of acual loss in cases of this character, and the trial judge decided that it was unnecessary to allege or prove any actual loss to have been suffered. It seems to us that in this holding the trial court was clearly in error, and that for this reason if no other, its decree must be reversed. It is authoritatively and definitely settled that in actions at law for damages on account of fraudulent representations made by the vendor, the vendee is entitled to recover only the difference between the actual value of the property and the amount paid for it, and not the difference between the actual value and the value which it would have had had the representations relied upon been true.

Sigafus vs. Porter, 179 U. S., 116.

And as stated by the trial judge it logically follows that in an equity suit to cancel a contract, no pecuniary

loss is shown to the party deceived unless it is shown that the actual value of the property was less than the purchaser paid or agreed to pay for it. In any event it is apparent that plaintiffs did not allege or prove any pecuniary loss or damage from any standpoint whatever, either in accordance with this or any other rule. This suit, though one brought in equity, is in substance and effect an action of deceit.

Arkwright vs. Brobeld, 16 Ch. D., 301, 320.
Smith vs. Chadwick, 20 Ch. D., 27, 68.

It has been many times stated by the Supreme Court of the United States, and so far as our investigation goes this rule has never been departed from by that court, that it is absolutely essential that in cases of this character brought to rescind contracts that plaintiff must show some actual damage or pecuniary loss. In the case of Southern Development Company vs. Silva, 125 U. S., 247, this rule is laid down in language that is unmistakable, in an action where the relief sought was a decree rescinding a contract of purchase on the ground of fraudulent representations. The Court there states:

"The burden of proof is on the complainant, and unless he brings evidence sufficient to overcome the natural presumption of fair dealing, a court of equity will not be justified in setting aside the contract on the ground of fraudulent representations. In order to establish a charge of this character, the complainant must show by clear and decisive proof * * * Fifthly, that it was acted on by complainant to his damage."

And further on in discussing the case, Mr. Justice Lamar uses this significant language:

"It is essential that the defendants' representations have been acted on by complainant to his injury."

Again: Mr. Justice Strong in the case of Atlantic Delaine Co. vs. James, 94 U. S., 207, used the following language:

"Cancelling an executed contract is an exercise of the most extraordinary power of a court of equity, and that power ought never to be exercised except in a clear case, and never for an alleged fraud unless fraud be made clearly to appear. Never for alleged false representations unless their falsity is certainly proven, and unless the complainant has been deceived and *injured* by them."

Again in the case of Clark vs. White, 12 Peters, 178; 90 Law Ed., 176, the Court uses the following language:

"In equity as at law fraud and injury must concur to furnish ground for judicial action, the mere fraudulent intent unaccompanied by any injurious act is not the subject of judicial cognizance."

The case of Shrader vs. Shrader, 51 N. E., 479, the Supreme Court of Indiana uses the following language:

"Fraud without damage or injury to the complaining party creates no cause of action. The rule is elementary and is one of universal application."

Wiley vs. Howard, 15 Ind., 169.
Cooley on Torts, pages 474 and 475.

In the case of Jackway vs. Proudfit, 76 Neb., 62, the Court states the rule to be as follows:

"It has been very justly remarked that to support an action at law for misrepresentation there must be a fraud created by the defendant, and a damage resulting from such fraud to the plaintiff; and it has been observed with equal force by a very learned judge in equity that fraud and damage coupled together will entitle the injured party to relief in any court of justice. In Bishpam's Principles of Equity, 6th Ed., Section 217, it is said that fraud without damage is no ground for relief at law or in equity. Again in Pomeroy on Equity Jurisprudence, 3rd Ed., Section 898, the rule is laid down that the party must suffer some pecuniary loss or injury as a natural consequence of the conduct induced by the misrepresentations. In short the representations must be so material that its falsity renders it unconscientious in the person making it to enforce the agreement or other transaction which it has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction equitable or legal. Courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral. In 14 Am. & Eng. Enc. of Law, 2nd Ed., 140, it is stated:

Relief of redress will not be granted either by way of rescision or by way of damages at law or in equity if it clearly appears that the party complaining has not sustained any pecuniary damage or otherwise been put in any worse position than he would have been if there had been no fraud. * * * While as suggested in the authority last quoted, there is some diversity of opinion in the adjudged cases as to the nature of damages which will warrant a rescision of a contract. The very great weight of authority, however, is in line with the text writer above quoted on the proposition that it must be actual pecuniary damage as distinguished from a moral or theoretical injury." In the case of American Building Association vs. Bear, 48 Neb., 455, the Court uses

the following language: "False representations as the basis of an action whether for damages or for the rescision of a contract, are such only as in some manner actually misled the complaining party to his damage."

In the case of Jackway vs. Proudfit, supra., a rehearing was asked for and granted, and on the rehearing the former opinion of the court was adhered to, and the case cited by Judge Dietrich in his opinion, Hansen vs. Allen, 117 Wis., 61, is distinguished and held not to apply to actions of this character, and only to apply in cases where the particular property intended to be purchased was not obtained.

The case of Clapp vs. Greenlee, cited in Judge Dietrich's opinion, is a case similar in facts to that of Hansen vs. Allen; and the case of Bret vs. Cooney, cited by the Judge, as we conceive it, is not in point in this case as there the act complained of was the violation of a moral obligation existing which the parties well understood. The only case cited by Judge Dietrich that appears to be in point is 146 Fed., 1000, and the facts of that case were somewhat peculiar, but, however that may be, it is only the District Judge's decision, and is, we submit, contrary to practically every other authority upon this question.

In the case of Shubert vs. Gas Light Company, 41 Ill. App., 181, it appears that plaintiff exchanged stock owned by him in one corporation for stock in another corporation, and in an action brought by his executor to exchange the stock, the Court says:

"It does not appear that the defendant Henry Shubert

was injured by the fraud said to have been practiced upon him. It is nowhere alleged that the Gas Trust certificates received by him were, or are any less valuable than the stock by him exchanged therefor, or that the income or profit therefrom has been or was any less than the increase of the stock would have been. To authorize a court of equity to set aside a sale made upon fraudulent representations it must appear that the party was not only misled, but misled to his prejudice or injury, for courts of equity do not any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts which are followed by no loss or damage."

In Aron vs. De Castro, 59 Hun., 623; 13 N. Y. Sup., 372, an action was brought to rescind a sale of stock upon the ground that the plaintiff had been induced to purchase the same by reason of false and fraudulent representations. The Court said:

"It is urged upon the part of the defendant that the plaintiff had shown no damage by reason of the representations made to him which lead to the purchase by him of the stock in question. This point seems to be well taken. There is no evidence going to show that the stock was not worth what was paid for it. Nor was there any evidence showing that the plaintiff at the time he attempted to rescind could not have sold the stock at the price which was paid for it. It is the well settled rule that it is the very essence of acts of fraud and deceit that the same should be accompanied by damage. Fraud without damage, or damage without fraud will not sustain an action. It is true that these principles were laid down in actions at law, but the same rule prevails in actions in equity, because unless the plaintiff has suffered damage by reason of fraudu-

lent representations he has not been wronged thereby, and the fraudulent transaction implies a wrong done as well as a person wronged. It may be urged that the mere showing that the representations which were the inducing cause of the purchase on the part of the plaintiff were false implies damage, but there is no presumption of damage arising from a representation which is proved to be false. It rests upon the plaintiff to prove not only the falsity of the representation, but that some damage at least has been sustained thereby, and there is no difference in this respect between proceedings in equity and proceedings at law."

The following cases holding to the same rule are directly in point:

Wenstrom vs. Parnell, 75 Md., 113.
Cochran vs. Pasacault, 54 Md., 1.
Bomar vs. Prosser, 131 Ala., 215; 31 So., 430.
Harris vs. Ransom, 25 Miss., 304.
Lake vs. Tyree, 90 Va., 719.
Marriner vs. Dennison, 78 Cal., 202; 20 Pac., 386.
Wylie vs. Howard, 15 Ind., 169.
Currey vs. Keyser, 30 Ind., 214.
Neidfer vs. Chastain, 71 Ind., 363.

In Volume 9 of Cyc., page 431, this rule is laid down in the following language:

"As in an action for deceit so also in an order to avoid a contract for false representations, it is essential that the party complaining shall have been prejudiced or injured by the fraud."

Again in Vol. 6, Cyc., page 326, the rule is stated in the following language:

"And the bill must show that injury has resulted to the complainant from the misrepresentations."

In Bailey vs. Fox, 20 Pac., 808 (Cal.), the Court uses the following language:

"The complaint states no cause of action so far as it relates to fraudulent representations respecting the question of former profits of the business. It contains no allegation that the plaintiff was induced thereby to pay a higher price for the goods than he would otherwise have done. Nor is it averred that the business was not profitable after the plaintiff bought into it. In other words, there is nothing in the complaint to show that the plaintiff was in any way injured by the representations admitting them to have been false. In order to entitle a party to rescind a contract he must not only show the fraud, but that as a result thereof some damage has resulted to him."

In the case of Morrison vs. Lods, 39 Cal., 385, the rule is stated in the following language:

"The rule is well settled that a recovery cannot be had for false representations without proof of damage."

In the case of Sonnesyn vs. Akin, 104 N. W., 1026, the Court uses the following language: Citing a great number of cases:

"Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts which are followed by no loss or injury. 1 Story's Equitable Jurisprudence, 202; Vernon vs. Keys, 12 East., 637; 9 Cyc., 431; and cases cited. It is accordingly well settled that false statements of a vendor of real estate in procuring the

execution of a written contract for the purchase and sale thereof, which are neither attended or followed by injury, will not sustain an action for deceit. As to this action it is said that 'there must not only be a false representation made with intent to deceive, but the representation must be relied on and cause damage to a party before an action will lie. Barber vs. Kilbourn, 16 Wis., 485; Castleman vs. Griffin, 13 Wis., 535; Freeman vs. Venner, 120 Mass., 424; Ide vs. Gray, 11 Vt., 615; Randall vs. Hazelton (Mass.), 12 Allen, 412; Fuller vs. Higdon, 25 Maine, 243. In Alden vs. Wright, 47 Minn., 225, 49 N. W., 767, the Court states that one of the essential elements which constitutes a cause of action for deceit is 'that the party induced to act has been damaged. He must have acted on faith of the false representations to his damage. The party cannot sustain an action of this character when no harm has come to him. Deceit and injury must concur—and it is equally well settled that a court of equity will not adjudge a rescision of a contract for the purchase and sale of real estate on account of fraudulent representations in procuring its execution, unless damage or injury is shown. Marriner vs. Dennison, 78 Cal., 202; 20 Pac., 386; Bailey vs. Fox, 78 Cal., 389; 20 Pac., 868; Morrison vs. Lods, 39 Cal., 381; Purdy vs. Bullard, 41 Cal., 444; Wainwright vs. Weske, 82 Cal., 193; 23 Pac., 12; Southern Development Company vs. Silva, 125 U. S., 247; 8 Sup. Ct., 881, 31 Law Ed., 678; Smith vs. Richards, 13 Peter (U. S.), 26; 10 L. Ed., 42; Wainscott vs. Occidental, etc., Assn., 98 Cal., 253; 33 Pac., 88; Huffman vs. Long, (Minn.), 42 N. W., 355; Johnson vs. Seymour (Mch.), 44 N. W., 344; Armstrong vs. Breen (Iowa), 69 N. W., 1125; Beard vs. Bliley (Colo. App.), 34 Pac., 271; Nelson vs. Grondahl, 12 N. D., 11,396 N. W., 299, and cases cited."

In the case of Purdy vs. Bullard, 41 Cal., 444, the first

syllabus is: "The party to a contract is not entitled to a judgment rescinding same on the ground of fraudulent representations unless he has been injured by reason of his reliance on such representations."

This whole matter is quite fully discussed in a note to Jackway vs. Proudfit, supra, as reported in Volume 14 of American & English Annotated Cases at page 258. The annotator of this case evidently considering the rule to be well settled, and it seems that it is well settled, and that the authorities are very strongly, and almost entirely one way, and under them it seems to us that the decision of the trial court is clearly erroneous.

In conclusion we have to say that the opinion of the trial court indicates that the judge was not at all clear as to what he ought to do about this entire matter, as it seems to us that he clearly committed error in deciding the case the way he did in view of his expressed opinion as to the facts. The judge clearly finds that there was no damage or injury suffered. He clearly finds that the plaintiff Richards did not come into court with clean hands. He suggests that Lamborn and Richards were co-operating together in such a way as to in a sense deceive the respondent King. The trial judge states in so many words that if Richards were the sole plaintiff he would dismiss the bill, and yet after all grants relief to a plaintiff who according to his own statement was clearly not entitled to relief, merely on account of the plaintiff Richards' relations to Lamborn. We believe that we are justified in saying that the whole record of this case disclosed the facts to be that Richards and Lamborn co-operated together, and in a sense

deceived King, and then when they discovered that they could not sell the bonds which they intended to issue upon the property, they resolved to call the whole deal off, and in order to do so prepared their stories so as to attempt to show fraudulent representations. We have here a mine promoter and a sugar broker, and they have done very well in stating their side of the case were it not for the letters and circumstances surrounding it. But nothing could be more significant than the letter written by Richards to Lamborn under date of March 5, 1909 (Tr., pages 427 and 428, Vol. 2), where Richards says: "There is another point I want to have cinched before we start on the thing, and that is the distribution of the bonds when they are issued."

And again where he says:

"But I expect to draw $22,500.00 in bonds our way."

And where he states:

"We can force King to put up a bond to pay the interest on the $80,000.00 bonds."

This was long after the fraud had been discovered, if any was discovered, and indicates that Richards and Lamborn were not the innocent and confiding victims of King, but were working together to deceive King, and that Richards, who was King's agent in the start, had turned against his principal, and was standing in with Lamborn to injure King. Richards exploited this mine for several months, and had possession under the contract. How much coal he took out does not appear; whether he received any profit or not does not appear.

Apparently he appropriated and kept the proceeds of all the coal he took out. He then abandoned the mine, wrote this letter on the 3rd of March, 1909, after such abandonment, and acted in a way that indicates clearly that he is not entitled to any relief whatever in a court of equity. We submit that the judgment rendered in the trial court is erroneous and should be reversed.

Respectfully submitted,

CLARK & BUDGE,

Attorneys for Appellants.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH DISTRICT

No. 1913

HARRY G. KING, and MARIA J. KING, *Appellants,* vs. ARTHUR H. LAMBORN, and JOHN G. RICHARDS, *Appellees.*	IN EQUITY. *Appeal from Circuit Court, District of Idaho. Southern Division.*

BRIEF OF APPELLEES

RICHARDS & HAGA,
Attorneys for Appellees.

*Filed*_____ _____ *1911.*

_____ *Clerk.*

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 14389

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY G. KING, and MARIA J. KING,
Appellants,
vs.
ARTHUR H. LAMBORN, and JOHN G. RICHARDS,
Appellees.

STATEMENT.

That between the Spring of 1906 and the 30th day of July, 1908, on which latter date the contract in question was executed, the Appellee, Mr. Richards, visited Salmon City, Idaho, and there became acquainted with the Appellant, Mr. King. Mr. King was President of the First National Bank, his friends and associates were of the best people in that section, he had a nice home and family. Mr. Richards used the Bank of Mr. King as his headquarters, and was in daily conversation with Mr. King, and became intimately acquainted with him, so much so that he consulted him in reference to his own business matters, did his banking with Mr. King's bank, and had great confidence and reposed great trust in Mr. King as his friend and advisor. That

during the time above mentioned, the testimony discloses that Mr. Richards and Mr. King were planning to dispose of this coal property; that they had numerous conversations and considerable correspondence; in this correspondence Mr. King seems quite enthusiastic about the property, its value and prospects. On or about June or July, 1908, Mr. Richards having been previously acquainted with the Appellee, Mr. Lamborn, Mr. Richards presented this coal property to Mr. Lamborn in New York, telling him what Mr. King had stated about the property, its production, value, etc., and showed Mr. Lamborn a letter from Mr. King relative to the production of the property during the previous eleven months. It seems that Mr. Lamborn wanted a more definite statement from Mr. King, and thereupon a telegram was sent to Mr. King; and Mr. King, in reply to such telegram, stated definitely what the mine had produced. Shortly after this, Mr. Richards and Mr. Lamborn met Mr. King at Salmon City, and there Mr. Lamborn found that Mr. King occupied a prominent financial position, had a fine home, a nice family, and entertained Mr. Lamborn very graciously, and Mr. Lamborn found that Mr. King stood high in that community, and that the statements made to him by Mr. Richards relative to his standing, were fully confirmed. And in their conversations about the sale of this property, Mr. Lamborn looked upon Mr. King as an associate in the undertaking and trusted him without reserve. That during their conversations relative to the property and its value, it appears that the old workings where Mr. King had been taking out his coal, were closed to inspection from a cave-in in the workings, and as showing

the character and value of the property, and the safety of the investment, should they enter into the contract, Mr. King made the following statements on which the appellees relied in entering into this contract, to-wit:

(a) That the entire breast of what was known as the "old room" in the workings of the property included in such contract, contained more than five feet of clean coal that would not require sorting.

(b) That during the eleven months immediately preceding the making of such contract the appellant, Harry G. King, had extracted and sold from such property more than 2300 tons of coal to the people around Salmon City.

(c) That during the same time he had also mined from such property and sold to the Copper Queen Mine, 300 tons of coal.

Upon this basis the respective parties entered into this contract, and the appellees paid their money and gave their notes.

The testimony further shows that though requested subsequently to the making of such contract, that Mr. King produce the record showing the production of the coal, that the appellee, Mr. Richards was becoming suspicious as to the truth of these statements by Mr. King, and Mr. King stated that he could verify his statements. The work was progressing in the development of this property and some time in January, 1909, following the execution of this contract, the appellee, Mr. Richards, discovered the stubs showing the weight of the coal produced since Mr. King had this

property, and from these stubs it was disclosed that instead of producing 2600 tons, as stated, he had only produced 585 tons, all told, and in the progress of this development, the old workings which had been closed by the cave were broken into, and this breast of coal which Mr. King stated contained over five and one-half feet of clean coal that would not have to be sorted, was found to be very largely waste. Thereupon appellees became dissatisfied and called upon Mr. King to cancel the contract and return the money and notes, which he refused to do, stating that the deal suited him and if it did not suit appellees they could do the best they could about it.

During the trial appellants introduced considerable testimony showing the great value of these coal lands as farming lands, presumably upon the theory that by so doing they made a showing that appellees had not been injured by this transaction. But the appellees contend that they were purchasing this land as coal land and based their investment upon the statements made by Mr. King, which were subsequently found to be untrue, and therefore, that the contract should be cancelled, and the money and notes be returned. Mr. King still holds title and possession to these coal lands, so that should the contract be rescinded, there is nothing for the appellees to return to the appellants to place them in *status quo*.

ARGUMENT.

The facts alleged and admitted are as follows:

1.

That the contract set forth on pages 13 to 16, and pages 136 and 140, inclusive, of the record was entered into, as alleged.

2.

That the appellant, H. G. King, was a stockholder, director and President of the First National Bank of Salmon City, Idaho, as alleged.

3.

That the payments alleged were made under the terms of such contract

4.

That the notes of the appellees were given as alleged.

The material facts alleged and denied are as follows:

1.

That the appellees reposed confidence in appellant, H. G. King, by reason of his business connections and social standing.

2.

That the appellees accepted the alleged false statements and relied upon them as true.

3.

That the appellant, H. G. King, for the purpose of inducing the appellees to enter into such contract and cheat-

ing and defrauding the appellees, falsely stated:

(a) That the entire breast of what was known as the "Old Room" in the workings of the property included in such contract, was clean coal and did not require sorting.

(b) That such coal found in the "Old Room" was the same strata as the upper strata then exposed at the breast of the new entry.

(c) That it was not possible for the plaintiffs to examine such portion of such workings of the mine for themselves.

(d) That during the eleven months immediately preceding the making of such contract, the appellant, H. G. King, had extracted and sold from such property 2300 tons of coal to the people of Salmon City.

(e) That during such time he had also mined from such property 300 tons of coal and sold the same to the Copper Queen Mine.

(f) That the said defendant, H. G. King, at the time of making such statement knew the same to be false.

4.

That appellees were deceived or injured by the alleged false statements of the appellant, H. G. King.

5.

That the appellants have not sold or transferred the said promissory notes.

Upon these issues such cause was tried, and as the speci-

fications of error, to a very large extent, are based upon the insufficiency of the evidence to sustain the decree of the Trial Court, in order to determine this question, it will be necessary to have recourse to the record. In calling the Court's attention to the testimony as bearing upon these controverted points, we will endeavor to do so in a cronological manner and in the natural order of events.

Standing of the Appellee, H. G. King.

On pages 109, 110 and 111, it appears that from and after the Spring of 1906, Mr. King was engaged in the banking business, and was President of the First National Bank of Salmon City, Idaho, and that the appellee, Mr. Richards, met Mr. King daily at his bank, using such bank as his chief loafing place, daily coming in contact with Mr. King, and thereby becoming intimately acquainted, and that Mr. King stood first class in that community, and this intimacy continued until January, 1909, and during that time Mr. Richards did his banking business with Mr. King, considering him as his confidential friend, discussing intimately with him his business affairs, and reposing in Mr. King the greatest confidence. And, as shown on page 141, by reason of such acquaintance, Mr. Richards reposed absolute confidence in Mr. King, and felt that he knew him to be true. And on pages 302 and 303, the appellee, Mr. Lamborn, it appears, found Mr. King when he arrived at Salmon was President of the First National Bank, that he had a delightful home and family, and that he entertained Mr. Lamborn at his home, and that he met the friends of Mr. King, who were some of the most influential citizens of that

place, and that he took occasion to ask, in as delicate a way as possible, the leading citizens there relative to the standing of Mr. King, and they represented it as the highest in town, and the general attitude, and the attitude of Mr. King and his family towards Mr. Lamborn indicated that Mr. King was at the height of the local business and society there. And from what Mr. Richards had previously told him, Mr. King reiterated to Mr. Lamborn the statements he had made to Mr. Richards in writing, and he found Mr. King occupied the position Mr. Richards had stated, and that he relied upon him, and they talked together in such a manner that he felt Mr. King was his friend, associate and partner, and that he entered into the contract by reason of his confidence in Mr. King, and upon that basis the contract was made. And on page 308 it appears that from the representations regarding Mr. King that had been made to him by Mr. Richards, and the statements that Mr. King had made regarding the production and sales in Salmon City of coal, and the standing of Mr. King, as President of the Bank, and from his letter stating that the coal business was, at that time, paying 6% on a $100,000, and on the proposition which Mr. King made to the appellees making it easier to handle the deal, Mr. Lamborn was willing to enter into the agreement. And on page 327, Mr. Lamborn relied upon the statement of Mr. King that the property would pay 6% on $100,000, and that he would not have entered into the agreement unless the property would pay the interest on the bonds proposed, $80,000.

And on page 332 it appears that Mr. Lamborn was satis-

fied that the statements of Mr. King were correct, because he was the leading banker in the town.

The Court will notice that the record discloses that there was no attempt in any manner to dispute or explain this testimony or place any other version thereon by the appellants at the trial, and so far as it has any bearing upon the controverted issues, it stands as conclusive.

Basis of Investment.

In order to present the facts in a logical order, it seems appropriate to call the Court's attention to those portions of the testimony bearing directly upon the basis on which the appellees entered into this contract.

On page 134, it appears that the price of the property, $80,000, had been discussed, and was based on the tonnage previously supplied; that it would be a safe investment on a basis of six per cent. And on page 235 it appears that on the basis Mr. King had represented that he had produced 2300 tons and that the breast in the old workings was clean, sorted coal, it would pay six per cent on the investment proposed. And, on pages 294 and 295 it appears that when Mr. Richards presented this matter to Mr. Lamborn, he was told that it would pay six per cent interest on $100,000, and this was based on the letter received from Mr. King, and that the property could be bought for $80,000, and by reason of the commission it could be bought for considerably less, and that probably Mr. King would retain an interest, and that Mr. Richards would return and try to induce Mr. King to keep one-fourth interest, and the letter was shown

Mr. Lamborn from Mr. King, showing that a tonnage of 2,300 tons from September to the following April or May had been produced, throws light on the basis on which the appellees invested their money under this contract.

And, on pages 300 to 302 it quite clearly appears from this discussion with Mr. King the basis on which this contract was entered into. And on page 313 it quite clearly appears that Mr. Lamborn went into this transaction on what Mr. King stated the mine *had* produced, not what it *would* produce.

And, again, on page 349, it is reiterated the basis on which the appellees invested their money. And on page 352 it appears that it was the statements made by Mr. King on which this investment was based. And, on page 382, from the testimony of Mr. King himself, this basis of investing, while not admitted in specific terms, is certainly not denied, and Mr. King admits the statement in his telegram.

It would, therefore, seem conclusive, because not disputed, that the appellees went into this transaction relying upon the standing of Mr. King on the basis that the property would pay six per cent on an investment of $80,000, based upon the statements of Mr. King as to the previous production for the preceding eleven months by Mr. King, and the quantity of clean coal in the breast in the old workings.

Mr. King's Statements.

The basis of the investment having been determined, the

question now reverts to the statements of Mr. King, alleged to have been relied upon by the appellees, and the truth or falsity of these statements.

The statements as alleged, tersely stated, are as follows:

(a) That Mr. King had produced and sold to the people of Salmon City, during the previous eleven months, 2300 tons of coal from the property in controversy;

(b) That during the same time Mr. King had produced from this property and sold to the Copper Queen Mine, 300 tons of coal;

(c) That the breast of coal which could not be seen or investigated by the appellees showed five feet of clean coal that would not have to be sorted.

As bearing upon the question of the truth or falsity of these three statements pleaded and denied, we will call the Court's attention to the specific testimony bearing directly upon these questions.

On page 126, it appears that Mr. King sent a telegram to Mr. Richards which was shown to Mr. Lamborn; and on page 127 it appears that this telegram stated that Mr. King had produced 2300 tons that year; and on page 130 it is positively stated that "there was more than 2300 tons supplied to the people of Salmon City," and that "he had supplied more than 300 tons to the Copper Queen Mine in addition to the amount supplied to the people of Salmon City." And on page 133 it appears that Mr. King stated to Mr. Richards and Mr. Lamborn that "he said it was 2300 tons and more, in addition to which he spoke of the 300 tons de-

livered to the Copper Queen Mine."

And on page 249 it appears that Mr. King stated that the production had been 2300 tons, and in addition to the 2300, he had supplied 300 tons to the Copper Queen mine.

And on pages 292 to 296 it appears that Mr. Lamborn first knew about this coal mine during the first week of June, 1908, and that Mr. Lamborn saw this telegram; and that Mr. Lamborn went for the first time to Salmon City in July, 1908; and that Mr. Lamborn saw a letter from Mr. King stating that the tonnage from the previous September to April or May, had been 2300 tons; and on page 296 it appears that Mr. Lamborn was not quite satisfied with the statement in the letter and he wanted to know exactly what had been produced, and the telegram of inquiry was sent and the reply came back, 2300 tons.

And on page 381 in the testimony of Mr. King, himself, he admits sending this telegram. And on pages 413 to 417 Mr. King contends that the 300 tons to the Copper Queen Mine was included in the 2300 tons. And on cross-examination Mr. King undertakes to show that part of this 2300 tons was produced by Mr. Pollard prior to the time Mr. King took the property. But no definite statement under this cross-examination could be procured from him, as he seemed to be striving to evade any positive statements.

It would therefore seem from the foregoing that it has been conclusively shown that Mr. King made the statements that were alleged to have been made by him; that he had produced for the people of Salmon City 2300 tons during

the previous eleven months and, in addition to this, 300 tons for the Copper Queen Mine.

Cave In Workings.

In relation to the alleged statements of Mr. King that a certain breast in the mine workings showed over five feet of clean coal, it seems proper at this time to call the Court's attention to the testimony showing that the appellees were prevented from inspecting this breast by reason of the cave in the workings and bad air, and by reason thereof had to rely upon the statement of Mr. King as to the quantity and quality of this coal.

On page 135 it appears that appellees were unable to examine this breast of coal "because of bad air and caves," and on page 147 it appears that they were not able to see this breast of coal "for the reason of caves and there was still bad air." And on page 205 it again appears that there was a cave in the workings which prevented an inspection of this breast of coal. And it again appears on page 239 that this breast of coal could not be seen and never was seen until January, 1909, as shown on page 205, when they connected with the workings containing this breast of coal in January.

And as the record shows no attempt to controvert this testimony in any manner, it would seem to have been conclusively shown that the appellees at no time prior to the making of such contract and until January, 1909, had any opportunity to inspect the quality or quantity of coal shown in this breast, shut off by reason of the caves.

Breast of Coal.

We will next call the Court's attention to the specific testimony bearing upon the statements of Mr. King, that this breast of coal which could not be seen, showed more than five feet of clean coal that would not require sorting. And on page 135 it appears that Mr. King stated that "There was more than five feet of clean coal that would not have to be sorted." And on page 143 it appears that Mr. King stated that "the breast that we could not see was a great deal better; that it had a clean product, while in the breast of the entry, that we could see, we knew that it was not a clean product." And on pages 83 and 84 it appears that Mr. King stated to the witness, Robert Forrester, that he had marketed from that property during the previous year and sold 3000 tons, and after he came into possession of such property on February 26, 1907. And on pages 80 and 81, and 103 to 105, appears the condition of the breast which Mr. King stated was five feet of clean coal. And on page 300 the statement of Mr. King is clearly set forth.

Q. What did he say as to the face of the breast you could not see being that kind of coal?

A. He said it was clean coal. He said the whole breast was five and one-half feet of clean coal.

And on page 383 Mr. King, when interrogated as to what statement he had made with reference to this breast of coal that could not be seen, said:

"Now I don't remember making any particular representations with regard to the coal in the old workings except that it was better in the old workings than it was in

the new workings," and which was not a denial at all. But on page 384 Mr. King stated: "I never told Mr. Richards or Mr. Lamborn that the coal would not need sorting. I told them the coal would get better, and it has got better." And he then goes on with a general explanation.

But, in the light of the positive statements as testified to by the two witnesses, and in the light of the lack of positive denial of such statements by Mr. King, it would seem to be quite clearly shown that these statements in relation to this breast of coal that could not be seen, were made by Mr. King, as alleged.

Reliance on Mr. King's Statements.

In addition to the statements heretofore shown of the reliance placed upon Mr. King and his statements by the appellees, on page 236, it appears that this investment was made "because I thought there was a continuous vein of this clean unsortable coal which Mr. King had said existed in the breast in the old face, and that it would pay interest from the start, and because Mr. King I considered to be a friend of mine."

Q. I say, why did you have to rely upon his statements?

A. Because we could not personally inspect this breast.

Q. Did you rely upon it?

A. I did rely upon it.

Q. Did you rely upon the statement relative to the breast you could not see being clean coal, and had done so as an estimate of the upper layer of the breast that you could see?

A. Yes, sir.

And on page 248 it appears that in the development that appellees were doing, they relied upon this statement, for the witness says: "Well, I thought we were going to open up into these rooms and then we would materially reduce the costs of production as soon as we got into the coal that would not have to be sorted, then our costs would be materially reduced."

Falsity of Statements.

Having shown the standing of Mr. King and the confidence reposed in him, the basis of the investment, and the material statements of Mr. King, we will now call the Court's attention to the testimony relating to the falsity of such statements.

On pages 83 and 84 it appears that it is a physical impossibility to have taken 3000 tons of coal out of the chambers made. And on pages 356 and 357 this testimony of Mr. Forrester is confirmed by the testimony of F. C. Miller, who was the manager of the mine under Mr. King. And on page 148 it appears that the stubs on which Mr. King kept a record of the tonnage of the coal produced were found. And on page 149 it appears that Mr. King was notified in reference to these stubs and requested to furnish the information showing the tonnage produced. And on page 150 it further appears that Mr. King was requested to furnish the information showing the tonnage produced to correspond with his statements. And on pages 151 and 152 it appears that Mr. King was requested to show that

the tonnage was as he represented it, and the quality of the coal at the breast as he represented it, and then this question is asked.

Q. What did he say?

A. He told me that the deal satisfied him, and if we did not like it we could do the best we could with it.

Q. Is that all that was said?

A. I told him I though that was the basis on which we were working and we certainly would have to do the best we could.

Q. What, if anything, was said about the return of the notes?

A. I asked for a return of everything.

Q. What did he say?

A. Well, that is when he answered that the deal satisfied him and if we did not like the deal we could do the best we could.

And on page 233 it appears they discovered that there was quite a shortage as to the coal produced during the previous eleven months according to the statements of Mr. King, and from the records they were able to procure, the production would be about 800 tons.

And on page 234 they gathered the source of information from the stubs of the weigh checks found in the office.

And on page 262 it appears how the record on these stubs was kept by Mr. Miller, which was confirmed by the testimony of Mr. Miller on pages 264, 265 and 266.

And on page 266 it appears that these stubs showed that during the time Mr. King stated he had produced the 2600 tons, that he had produced actually 585 tons; and it appears also that on pages 266 and 267 that 585 tons is correct, and on this account the plaintiffs "exhibit K," these stubs, was omitted from the record.

And on pages 413 and 414, Mr. King admits that he represented that the mine had produced 2300 tons, that this tonnage included the 300 tons delivered to the Copper Queen Mine.

And on page 314 it appears that from their investigations they found this tonnage far short of Mr. King's statement.

And on pages 80, 81, 82, 83 and 84, and the maps on pages 104 and 105 showing the condition of the breast represented as clean coal taken together with the testimony above shown, would seem to demonstrate beyond any reasonable doubt that the statements of Mr. King were false.

Clean Hands of Mr. Richards.

Counsel for appellants in their brief seem to lay great stress on the fact, as they claim, that the appellee, Mr. Richards, does not show himself entitled to appeal to a court of equity by reason of not coming into such Court with clean hands. In order to present this properly to the Court, it would seem that the Court should take into consideration the situation of the parties prior to the making of this contract, and the intimate relationship beeween Mr. Richards and Mr. King, their correspondence, and their purpose in seeking to dispose of this property. Therefore,

taking into view the situation of the parties as above shown, before the contract in question was made, and the option found on page 422 which Mr. King had given Mr. Richards resulting from the first acquaintance with the coal mine by Mr. Richards about January, 1907, as shown on page 111, and the information Mr. Richards had received through the letters Mr. King had written him, as shown on page 112, and the conversations they had over this matter, as shown on page 115, and also the letters he received from Mr. King after he went to Denver, as shown on pages 419 to 421, where, if anything can be inferred from a letter, it shows that Mr. King was fully as anxious as Mr. Richards to dispose of this coal property, in the manner he tried to enthuse Mr. Richards over this coal proposition in these letters, and also confirmed by the testimony shown on pages 123, 124 and 125, where they had conversations relative to the value of this property, all of which took place before Mr. Richards saw Mr. Lamborn in relation to this coal property. Then, upon meeting Mr. Lamborn, as shown on pages 125 and 126, Mr. Richards showed Mr. King's letters to Mr. Lamborn, also the telegram he had received from Mr. King. And on pages 128 to 129 it appears that Exhibit "G" shown on page 422 was sent to Mr. King for signature in March, 1908.

It appears from page 128 of the record, Mr. Richards presented this matter to Mr. Lamborn in the early part of June, 1908, and sent the telegram at the request of Mr. Lamborn, as shown on page 129, which is the telegram from Mr. King stating that he had produced 2300 tons.

And on page 381 Mr. King admits sending this telegram

to Mr. Richards.

And on pages 129 and 130 it appears that Mr. Lamborn knew of this contract, "Exhibit G," and the telegram was sent because Mr. Richards was considering becoming a partner with Mr. Lamborn and taking over the property.

And on pages 129 and 130 it appears that he wished to get as good a deal as he thought Mr. King would give.

We feel it necessary to call attention to defendants' "Exhibit 11," found on pages 454 and 455 of the record, as showing the situation relative to the relationship of Mr. Richards to Miss Constance, and in connection therewith call the Court's attention to the testimony of Mr. Lamborn on page 341 when this letter was offered in evidence, as showing the surprise of Mr. Lamborn that such a letter should be introduced in evidence, but it indicates the feeling of Mr. King in this matter towards Mr. Richards. And we now desire to call the Court's attention to the testimony relative to the commission which Mr. Richards was to receive for the sale of this property during their conversations prior to the time it was presented to Mr. Lamborn, as shown on pages 124 and 169 of the record and subsequently after he had presented the matter to Mr. Lamborn that he stated he was to receive $25,000 if I sold the property for $80,000. This certainly shows good faith towards Mr. Lamborn.

And, also on page 311, and again on page 328, where it shows that Mr. Lamborn was to get his two-thirds of the $22,500 in bonds which Mr. Richards was to get from Mr. King for the sale of the property.

And, on pages 433 and 434 of the record, where Mr. Richards writes Mr. King long prior to the time that Mr. Richards had presented this matter to Mr. Lamborn, and outlines the plan which he suggested they dispose of the property. And in January, 1908, he again writes Mr. King, where he requests him to send data that would be of assistance, such as the tonnage in sight, the thickness of the vein, the cost of mine, the cost of developing, etc., as shown on pages 435 and 436.

And on pages 436 and 437, it appears that Mr. Richards and Mr. King had a very familiar relationship and trusted each other fully, and that they were planning how Mr. Richards could secure an interest with Mr. King in the property. Then in June, 1908, after Mr. Richards had met Mr. Lamborn in relation to this property he wired Mr. King as shown by "Exhibit 7," on page 439, submitting a proposition to Mr. King, whereby Mr. King was to retain one-fourth interest.

And then, on page 440, Mr. Richards wired Mr. King "to answer long telegram say—impossible to accept terms, wish you could come on here." And the attempt to place a bad construction upon this language, but it is one of the natural things for men to do under such circumstances, as it is apparent the deal had not progressed in a manner that was fully satisfactory to Mr. Richards under the proposition he had wired Mr. King.

And on page 173 it appears that Mr. Richards explained to Mr. Lamborn the proposition.

And on page 174 it appears that Mr. Richards stated to

Mr. Lamborn that he was willing to take ¼ interest in the property and that there was nothing said about commission at that time.

And on pages 174 and 175 it appears that Mr. Lamborn understood that Mr. Richards was to pay for his one-fourth interest and that he did put up this one-fourth.

Counsel for appellants seek to show that Mr. Richards was not dealing fairly with Mr. Lamborn, and that he was not to pay his one-fourth at all, because of the letters that Mr. Richards had written Mr. King, as heretofore shown, long prior to the time he had met Mr. Lamborn in reference to this coal matter, whereby he stated it was supposed he was to put up one-fourth. But we think the Court will see that in dealing with Mr. Lamborn that no such subterfuge was resorted to. Mr. Richards had shown to Mr. Lamborn "Exhibit G," and stated that he was willing to take one-fourth.

And on page 176 it appears that $21,000 was paid, Mr. Richards paying $1,000 in cash, but that Mr. Lamborn did not pay any portion of that for Mr. Richards, and Mr. Richards gave his notes to Mr. King for $9000 together with the cash he had paid, being his one-fourth, and the giving of these notes is admitted.

And on page 177 it appears that Mr. Richards represented to Mr. Lamborn that he was paying one-fourth of the purchase price, and that he did pay one-fourth. And it appears that counsel then called to the attention of the witnesses the letter he had written Mr. King, shown on pages 437 and 438 several months prior to the time the witnesses

had met Mr. Lamborn in reference to this coal matter, wherein he says: "Of course, I am selling only a one-half but I desire to represent that I am investing some too so that a contract for the whole is necessary." This letter could have had no reference to the deal with Mr. Lamborn for the witness as shown, stated to Mr. Lamborn fully and frankly, just what the deal proposed to him was.

And on page 178 it appears that "Exhibit G" shown on page 422 was then sent Mr. King to sign. And in this way an attempt is made to cast a cloud over the good faith of Mr. Richards towards Mr. Lamborn, but the record fails to disclose any bad faith of Mr. Richards towards Mr. Lamborn, as will more fully appear by the testimony on page 192, where he stated he did not have an agreement with Mr. Lamborn "any more than I told him we were in on the transaction on an equal basis and that he was entitled to his three-fourth of these bonds that were returned to me by Mr. King, that is of the $22,500 of bonds." And the witness states: "I was giving him part of these bonds that Mr. King was giving me as commission."

Q. Now did Mr. Lamborn understand that you were going to give him 2/3 of those $22,500 in bonds?

A. He understood that he was sharing with me.

Q. Did he understand he was going to get two-thirds of those $22,500 bonds?

A. He understood he was getting his pro rata.

Then the witness goes on to state that at that time Mr. Lamborn did not know how much he was to get from Mr.

Richards, and that Mr. Richards did not tell him until after securing the contract with Mr. King, the contract being plaintiffs' "Exhibit A" found at pages 13 to 16 of the record.

And this will more fully appear on page 226 where the witness says: "After I had received the contract from Mr. King I wrote to Mr. Lamborn that we had an additional amount of bonds coming to us, I don't remember if I stated the exact amount or not.

Q. Is it a fact or not that Mr. Lamborn went in on exactly the same basis as you did?

A. Yes sir.

And the receipt on page 427 shows the amount of bonds that Mr. King was to turn over to Mr. Richards and shows that there was a change in the times of payments to be made by Mr. Richards, which bonds were to be turned over only on the payment of the three notes.

And on page 227 it appears just how it was determined that $22,500 of bonds was to go to Mr. Richards.

And on page 228 the witness states that he kept nothing back from Mr. Lamborn.

And on pages 294 and 295 Mr. Lamborn explains the basis on which he and Mr. Richards entered into this arrangement, and that Mr. Richards would go back to Idaho and get the best deal he could from Mr. King and if necessary they would swing the whole property themselves, but that he would try to get Mr. King to retain a one-fourth interest.

And on page 317 Mr. Lamborn says he expected Mr. Rich-

ards to pay his one-fourth, or $10,000.

And on page 328 the witness says: "I was to obtain my proportion of any profit that Mr. Richards made from the sale of the property." But on pages 376 and 377 it appears that the option was extended by Mr. King and it was suggested by him that Mr. Lamborn come and examine the property. But Mr. King attempts to show that Mr. Richards was not dealing in good faith with Mr. Lamborn, and this statement of Mr. King is the only possible suspicion that can cast any cloud upon the conduct of Mr. Richards in his dealing with Mr. Lamborn.

But in the light of the entire relation and situation of these parties, such testimony is not entitled to a great deal of weight.

Payment of $2500.

In reference to the question of bad faith of Mr. Richards, Counsel attempts to show that a certain payment of $2500 was a fiction. But we think that when we call the Court's attention to the actual facts disclosed by the record, that the bad faith would appear on the part of Mr. King in this matter.

And on pages 180 to 186 of the record it appears that Mr. Richards met Mr. Lamborn about the first of June in New York City, and that he wrote Mr. King from New York City, a letter marked "Exhibit C" found in the record on page 438, in which the witness states: "I am trying on a basis of $40,000 for the 1/2 interest representing that I am buying the 1/4 which we can fix up alright between us."

Which the witness explains meant that he wanted to have an interest, and that when he went back to Salmon City there was paid $7,500, $2500 of which Mr. Richards paid.

From there on, as shown on pages 182 to 186, Counsel very shrewdly undertakes to show that Mr. Richards did not pay this $2500, but on page 184 the witness states that he paid him my notes for $7,500 leaving $2,500 of the $10,000 to be paid.

And on page 185 the witness states in answer to the question:

Q. Yes, but you stated, Mr. Richards, that you paid him $2,500 at the time this $7,500 was paid?

A. Yes, $1,500 of that was notes and $1,000 in cash.

And on page 229 the witness states that he had transactions in Texas and that he needed a credit.

And on page 317 it appears that Mr. Lamborn expected Mr. Richards to pay $10,000 of the $40,000 either in cash or notes.

And on page 349 Mr. King explains that there was simply an exchange of checks for this $2,500. But on page 396 it appears that Mr. Richards actually gave Mr. King $1,500 in notes and cash for $1,000, and that he paid him exactly according to the agreement, therefore, it must be apparent to the Court that all of this was done simply to throw a suspicion where no suspicion was due, upon Mr. Richards, for it is perfectly apparent from the record that Mr. Richards was a little short of money and Mr. King agreed to accommodate him for a time, and that Mr. Richards paid

just exactly as he agreed to pay.

In the light of the foregoing record and many other circumstances which will come to the Court's attention from the record, we feel confident that it will be apparent that Mr. Richards acted in perfect good faith with Mr. Lamborn, and came before this Court with clean hands.

Basis of Settlement.

On pages 149 to 152 appears the conversation that Mr. Richards had with Mr. King relative to the fact that he was suspicious that the tonnage Mr. King had stated, was not correct, and none of this testimony is disputed by Mr. King in any manner.

And on page 245 again appears what the witness Richards said to Mr. King on the basis of settlement because of his misrepresentations.

And on page 321 it appears that Mr. Lamborn had discovered that they had been deceived; that the total tonnage of the mine was only about 650 tons instead of 2600 tons.

And on page 345 Mr. Lamborn states he discovered that Mr. King had not produced during the previous eleven months the 2600 tons stated, but only about 650 tons.

And on page 349 that he became dissatisfied because it would not pay six per cent on the basis represented to him.

And also on pages 350 and 353 the witness states his reason for being dissatisfied because of false statements made by Mr. King on which he had made his investments.

And on page 395, Mr. King states his position where it

appears that Mr. King regards this property of very considerable value, and that this suit is not a matter of financial importance to him but he only regards it in the sense of humiliation because of the contest, and that it is not a question of money at all with him. This shows the state of the minds of the contesting parties.

Value as Farm Lands.

Upon what theory the evidence was introduced showing the value of these coal lands as farming lands because of a rapid rise in the value of lands around Salmon City, since this contract was entered into, we do not understand, but we assume it is upon the theory that because these lands have become very valuable for a purpose wholly outside of the value that was considered when the contract was entered into, that the appellees have no right to complain.

This contract was not entered into on the basis that they were buying farm land or lands that might be considered valuable for suburban lots, but they were buying them solely for the purpose of coal and made their investment solely upon that basis and none other, and if they do not wish to take advantage of this wonderful increase in value it certainly would be greatly to the advantage of Mr. King and about which he has no right to complain.

But. we feel that the testimony demonstrates that Mr. King deceived these appellees, that they are entitled to the property they undersood from him they were purchasing, and certainly such testimony could throw no light upon the questions at issue in this action.

On page 88 of appellants' brief attention is called to a letter written by Mr. Richards to Mr. Lamborn under date of March 5th, 1909, in which they lay great stress upon the lack of good faith of both Mr. Richards and Mr. Lamborn, in relation to this transaction, but we call the Court's attention to the following testimony as showing how unjustifiable the inference sought to be impressed upon the Court is, (therefore, we call the Court's attention to the testimony) which shows that when this letter was written in March, 1909, it was a little after and about the time that appellees had discovered the fraud that had been practiced upon them, and they were undertaking to compel Mr. King to come to some adjustment of this transaction by reason of his false statements, and we are satisfied the Court will discover that this statement is borne out by a reference to the testimony, as shown on the following pages:

On pages 147 to 149 it appears that Mr. Richards had returned from Texas in November of 1908, and he visited this property daily until about March, 1909, and he then saw the room from which Mr. King claimed to have taken the tonnage of about 2600 tons during the previous eleven months, and that he found a breast of five feet or more of coal that was not clean coal but had to be sorted. And he found the stubs showing Mr. King's tonnage for the previous eleven months.

And on page 149 he calls it to Mr. King's attention and Mr. King stated: "Oh, he said that didn't make any difference, he supplied the 2300 tons and he knew it and he could show that he had."

And then on pages 150 to 152 it shows that Mr. Richards told Mr. King about these stubs and Mr. King just laughed at this statement and said that Mr. Richards had better go back and look at it again.

And on page 151 in this conversation Mr. Richards states:

"He told me that the contract,—the deal satisfied him and if we did not like it we could do the best we could with it." And the Court will notice that nowhere in the record did Mr. King undertake to dispute this testimony.

And on page 152 it appears that Mr. Richards requested Mr. King to return the notes and everything he had received from appellee.

And on pages 232 and 233 it appears that in January, 1909, Mr. Richards discovered that the coal Mr. King claimed to have produced during the previous eleven months was very short of what he had stated.

And on page 234 he said he discovered this from the stubs and weigh checks which he had found.

And on page 345 it appears that in January, 1909, when this discovery was made the appellees became dissatisfied and the time of this dissatisfaction is shown quite clearly on page 320 where Mr. Lamborn states it was about January 20th, 1909.

Now, taking the letter cited by Counsel on pages 427 and 428 which was written some two or three months after the discovery of this fraud and it seems that Mr. Richards had been consulting what he considered the next best lawyer in Salmon City about these false statements, and here Mr.

Richards states: "From what he gave me it would be foolishness for King to refuse to make good." And the letter proceeds in reference to how they could compel Mr. King to do justice and Mr. Richards states: "From what O'Brien said we can force King to put up a bond to pay the interest on the bonds ($80,000).

Now, this letter is just exactly the kind of a letter an honest man would write when he felt he had been outraged and wronged, and instead of being a letter indicating any bad faith between these men, it indicates good faith, that they were intending to compel Mr. King to do justice for the wrong that he had done.

In Cunningham-Pettigrew, 169 Fed., 344, the Court says:

> "It is well settled that the inequity which will repel one from courts of equity under the maximum that 'he who comes into a court of equity must do so with clean hands' must relate directly to the very transaction concerning which he claims."
>
> Shauer-Heller Ins. Co., 108 Fed., 834.

And all through their brief there is a general insinuation against the appellees which is not justified from the testimony. And, as evidence of this we call the Court's attention to the argument of Counsel for appellants on pages 22 and 24 where they claim that appellees asked a recision on the ground that Mr. King had stated that the property was of great commercial value and that the investment made by the plaintiff would result in great profit to him, and that if the plaintiff would enter into the agreement the

sale for the coming year could be largely increased.

And on page 24 the representations that the property was of great commercial value by reason of coal deposits.

Now, any lawyer would know that such statements in themselves, would not be a basis for a recision because of the mere expressions of opinion, but they were pleaded simply to show the surrounding circumstances, and the condition of Mr. King's mind, and they simply constitute an element as tending to confirm the material false statements made by Mr. King.

And then on page 27 quoting the testimony about the great commercial value of the property, also page 28, and numerous places in the record a similar vein of argument, hence, it is perfectly clear that the appellees are claiming a recision on the ground of a false statement of facts made by Mr. King and not the statement of opinion.

Our contention is, that these representations of Mr. King, that is:

(a) That he had produced 2300 tons during the previous 11 months;

(b) That in addition to this he had produced 300 tons for the Copper Queen Mine during the same time;

(c) That the breast of the old workings which could not be seen because of a cave showed over five feet of clean coal that would not need sorting.

Were all real or material facts. They were each and all of them false; they were each acted upon by the appellees

in ignorance of their falsity and with a reasonable belief that they were true; and that they were the very ground on which the transaction took place, although not the sole cause, but were the proximate, immediate, and material cause; and that the appellees had no means of ascertaining their truth other than from Mr. King; and that they were made to induce appellees to enter into such contract and make such payments.

The rules of law applicable to such conditions are quite clearly stated in the following decisions:

In Farrar vs. Churchill, 135 U. S., 609; 34 L. Ed., 246, and on page 250 the Court used the following language:

> "The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged, the facts sustaining it must be clearly made out. The representations must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were the proximate, immediate and material."

Lynch vs. Mer. T. Co., 18 Fed. 488;
Alger vs. Kieth, 105 Fed. 105.

In Trenchard vs. Kell, 127 Fed. 601, the Court says:

> "The representation must be in regard to a material fact, must be false, and must be acted upon by the other

party in ignorance of its falsity, and with a reasonable belief that it is true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material."

And, in the case of Cooper vs. Schlesinger, 111 U. S. 148; 23 L. Ed. 382, and on page 384 the Court uses the following language:

"The misrepresentation must be in relation to a fact or a state of facts which is material to the transaction, and the determining ground of the transaction. There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it, or at least not on the same terms. Both facts must concur. There must be a false and a material representation, and the parties seeking relief should act upon the faith and credit of such representation. * * * (Representation to be material should be in respect of an existing and ascertainable fact, as distinguished from a mere matter of opinion or advice.)"

Having shown the material statements claimed to be false, and that they clearly come within this ruling, it is further contended that it is immaterial in an action for recision whether Mr. King knew the statements to be false or not, and this is clearly shown by the following rulings:

In Smith vs. Richards, 28 U. S. 24, 10 L. Ed. 42, and on page 47 where the Court uses the following language:

"Whether the party thus representing the fact knew

it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one did not know or believe to be true, is equally in morals and law, as unjustifiable with the affirmation of what is known to be positively false, and even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party * * * It misleads the parties contracting on the subject of the contract."

In *re* American Knit Goods Mfg. Co., 173 Fed. 482, this Court says: "The misrepresentation of a material fact upon which the other party relies, even if innocent, is good ground for recision."

Lehigh Zinc & I. Co. vs. Bamford, 150 U. S., 673; 37 L. Ed. 1217.

Appellees contend further that as the testimony shows they had no means of investigating the truth or falsity of these statements of Mr. King, they were compelled to rely upon such statements and this being true, the rule contended for by appellants that where one fails to make use of information readily at hand will not be heard to complain, does not apply to the case at bar, as the evidence is clear that Mr. King alone knowing what he had produced, and made the statements about the quantity and quality of the coal at the breast which was covered by reason of a cave, and which was most material relative to the value of the property as a coal property and on which the appellees relied, hence, we contend that the rule contended for by appellant, as shown

in Southern Dev. Co. vs. Sylva, 125 U. S. 247, and Farnsworth vs. Duffer, 142 U. S. 43, and Shapperio vs. Goldberg, 192 U. S. 232, does not apply to the case at bar, and we contend further that:

If the purchaser has no reasonable means of testing the truth of the vendor's statements, or discover the facts which are material in inducing the parties to contract, the purchaser can rely upon the statements made by the vendor.

Endsley vs. Johns, 120 Ill. 469;
Gammill vs. Johnson, 47 Ark. 335;
Roror Iron Co. vs. Traut, 83 Va. 397;
White vs. Smith, 54 Iowa, 233;
(See) Fargo Gas & C. Co. vs. Fargo Gas & E. Co., 37 L. R. A. 611;
Tharp vs. Ponce, 74 Me. 470;
Cottrill vs. Krum, 100 Mo. 398;
Fishback v. Miller, 15 Nev. 428.

"When a person to whom the representations are made has not the present opportunity or ability to test or verify them, the latter has a right to rely upon such representations. It is sufficient if the misrepresentation is approximate and immediate cause, or the inducement of transaction."

Smith on Fraud, Sec. 60-61;
Kerr, Fraud, p. 74-75.

In his admirable work on Fraud, Mr. Smith, at Section 60 lays down the rule that a man may act upon a positive representation of fact, notwithstanding that means of knowl-

edge were especially open to him, has now become very widely accepted, at least as a general doctrine at law as well as in equity.

(See) Pomeroy Eq. Jur., Sec. 895.

If the representations relate to property not accessible to examination on the part of the person to whom made, or if he is ignorant of the subject matter of the contract, and the other party has superior means of information from experience or special knowledge, a recision may be made.

Smith on Fraud, Sec. 126.

In another case where the complainants were incapable of making an examination of the subject matter of the sale, the Court, in permitting a recision of the contract, said:

> "It is now settled law that one who chooses to make positive assertions without warrant will not excuse himself by saying that the other party need not have relied upon them. He must show that his representations were not in fact relied upon. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract with full means of knowledge, has deliberately pledged his faith. Mead vs. Dunn, 32 N. Y. 275. To the same effect are Eaton vs. Winnie, 20 Mich., 156; McBeth vs. Craddock, 28 Mo., App. 380, and numerous cases there cited."

Dow vs. Swain, 58 Pac. 273-274.

As to what constitutes a false representation is quite clearly defined in the case of Simon vs. Goodyear, Met. R. S. Co., 105 Fed. 580-581, where the Court uses the following language:

> "It was not of the essence of his case that Rodenbach knew his representation to be false. If he made the representation, which it is clear he did make, with the purpose of procuring the contract in question, and with the intent that the plaintiff should act upon it, without knowledge as to whether it was true or not, it would be a false representation within the rule."

We contend that under the circumstances in this case, the appellees are entitled to a recision of this contract and we feel that this position is well taken and is sustained in the case of Kell vs. Trenchard, 142 Fed. 23, where the Court says:

> "The law is well settled that a false representation by a vendor of a material fact constituting an inducement to the contract of purchase, and on which the purchaser had the right to rely, is a ground for the recision of his contract by a court of equity, and that, too, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being not whether the vendor knew the representation to be false, but whether the vendee believed it to be true and was misled by it in entering into the contract."

And, as to what constitutes the inequity justifying a recision, the Court makes a quite clear statement in the case of Billings vs. Aspen M. & S. Co., 51 Fed. 338, where on page

347 the Court states:

> "In such case the inequity would exist not in making representation originally, but in claiming the benefit thereof after discovery that the other party had been misled to her injury, by relying on the statements made for the purpose of inducing action on her part, which now appear to be wholly untrue."

It is equally true that where misrepresentations have been made, recision of contracts entered into under such circumstances will be readily rescinded by Courts of Equity where the parties can be placed in *status quo* as is quite clearly stated in Mathers vs. Barnes, et al, 146 Fed. 1000, and on page 1019 where the Court states:

> "It is no doubt true that rescission will not be ordered where the *status quo* has been so changed that it cannot be restored. * * * It is satisfied as a rule where the party against whom rescission is asked gets back what he parted with, and the other party gives up what he got, unchanged * * * they get back the property in the same condition that it was, even though their relation to it may not be so favorable, which is all they can ask, being themselves alone responsible for the change. Otherwise, notwithstanding the fraud practiced upon them, if the argument should prevail, the plaintiffs would be compelled to keep the property which has been put off upon them, which was not what they bargained for or wanted, or was represented to be; while the defendants by whom this situation was brought about, would be permitted to have the full benefit of the transaction, and retain the large amount of money which they made out of it. This is

not equity, and is not the rule to be here enforced."

The foregoing rule becomes more apparent in the justice it administers, if applied in this case, because the appellees are not getting what they bargained for, and the appellant now retaining all that he ever had in the same condition in which it was when the contract was made, and in addition thereto has become wonderfully enhanced in value, according to their own testimony, we feel that the foregoing shows that an injustice was done by the statements of Mr. King, and clearly shows the rules that are applicable thereto in relieving the party wronged from the effect of such misrepresentation, and clearly sustains the right contended for by the appellees to have this contract in question rescinded, and the money and notes returned.

We now feel justified in calling the Court's attention to the confused manner in which counsel for appellants present the questions in controversy here, in their brief. Beginning with page 71 of their brief, it is contended that to entitle the appellees to a rescission herein, they should have alleged and proved the pecuniary loss or damage they had suffered by reason of the deceit alleged, and then Counsel cites numerous cases of actions at law to recover damages for deceit; and also cases for specific performance, and cites numerous cases for rescission where the transactions had been absolutely completed, and some cases had continued for years and then insists that the rule as applicable to such cases, should be applied to the case of a rescission of a contract where the transaction had not yet been fully completed.

Our contention is that the rules applicable to a rescission

of a contract for misrepresentation is, especially where the transaction has not been completed, very much more liberal than in actions for rescission where the transaction has been fully completed, so far as the necessity for showing injury is concerned, before the Court will set the entire transaction aside; and the rule applicable to a rescission of a preliminary contract merely, is not subject to the same rules as applicable to suits for damages for deceit or for specific performance, or where transactions have been fully completed and property transferred, and in support of this contention, we desire to call the Court's attention to the following decisions:

In actions for damages and false representation or deceit, it is necessary to show not only that the representations were false, but the actual damages sustained by reason thereof, as shown in cases cited by Counsel for appellants, such as Sigafus vs. Porter, 179 U. S. 1645, L. Ed. 113, where on foot of page 114 Justice Harlan says:

> "This action was brought to recover damages for deceit * * *"

And hence was an action at law and the rule as to measure of damages is there stated.

Our contention is more fully illustrated by the statement of the Court in Ming vs. Woolfalk, 116 U. S. 599, 22 L. Ed. 741, where in defining the requisites necessary to sustain an action for deceit, the Court says:

> "The requisites to sustain an action for deceit * * * are the telling of an untruth, knowing it to be an un-

truth, with intent to induce a man to alter his condition and altering his condition in consequence whereby he sustains damages."

And, in the case of Pittsburg L. & T. Co. vs. Ins. Co., 140 Fed. 888, and on page 892 where the Court in showing the distinction between these different characters of action, uses the following language:

"Neither are they seeking to set the agreement aside, on the ground of material representation; to which relief they might possibly be entitled. They hold to the bargain, but claim they were overreached and cheated in making it, which must, therefore, be established in order to entitle them to a verdict. This is the gist of the action and has a clear apprehension of what is necessary to a correct disposition of the case. Let us look at some of the authorities. The action for deceit at common law. * * * is founded on fraud. It is essential to the action that moral fraud should be established * * * It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew at the time of making it, that the representation was untrue, or to adopt the language of the Learned Editors of the Leading Cases, that the defendant must be shown to have been actually and fraudulently cognizant of the falsehood of the representation, or to have made it fraudulently with the belief that it was true. * * * The gist of the act is fraud in the defendants and damages to the plaintiff. Fraud means intention to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action although

the representation turned out to be entirely untrue * * * That an action of deceit requires for its foundation a false statement knowingly made, or a false statement made in ignorance of and in reckless disregard of its truth or falsity, and of the consequences such a statement may entail. The evil intent, the intent to deceive is the basis of the action. * * * before the plaintiff can recover in an action for deceit, he must prove two things: That the representation was false; and that the person making it knew it was false; * * * such an action differs essentially from one brought for recission of a contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand. But when the action is for fraud and deceit, it is not enough to show that the representation was untrue, for if it was honestly believed to be true, that is a good defense. * * * The basis of the action of deceit is the actual fraud of the defendant, his moral delinquency, and therefore, his knowledge of the falsity his knowledge of the representation, or that which in law is equivalent thereto, must be averred and proved. There is much confusion of the authorities upon this subject, due in part to the erroneous assumption that that which is merely evidence of fraud, is equivalent to the ultimate fact which it tends to prove, and also to the assumption likewise erroneous that an untrue representation should be sufficient to support a suit in equity for a rescission of a contract, is equally available in an action of deceit."

The foregoing very clearly points out the distinction in these cases and the confused manner in which appellants

have presented these rules in their brief. This contention is more fully illustrated from the cases appellants have cited, such as Smith vs. Bolles, 132 U. S. 125, 33 L. Ed. 279, which was an action for damages for false representations or deceit in the sale of shares of stock, and the rule of the measure of damages applicable to such an action at law is there declared.

And, in the case of Union Pac. Ry. Co. vs. Barnes, 64 Fed. 80, which was an action for damages for false representations and where the rule for damages is laid down. Also in Hindman vs. First National Bank, 112 Fed. 931, which was an action for damages for deceit, and where on page 944 the Court uses the following language:

> "One who has been induced by false representations to buy property, has open to him no less than three remedies. He may rescind and sue at law for the consideration, he may bring an equitable suit for rescission and obtain full relief, or he may retain what he has received and bring his action for fraud and deceit. * * * Before the plaintiff can recover in an action of deceit he must prove two things: that the representation was false, and that the person making it knew it was false. * * * Such an action differs essentially from one brought for rescission of contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand. But, when the action is for fraud and deceit, it is not enough to show that the representation was untrue; for, if it was honestly believed to be true, that is a good defense."

We contend further that this rule applies to transactions fully consummated more than in mere contracts of purchase, which contention we feel is clearly illustrated by the following decisions, also cited by appellants in the case of Atlantic D. Co. vs. James, 94 U. S. 24 L. Ed. 112. This was an action for the cancellation of the contract relating to a transaction which had been fully consummated by the parties thereto, by mutal transfers intended as a settlement of mutual claims, and the Court says:

> "It was not until nearly six years afterward, no complaint of unfairness having been made to the defendants in the meantime, that this bill was filed to undo what had been done, and to procure a cancellation of mutual releases and of the transfers of stock to the corporation."

In the light of the foregoing situation the Court made the following declaration:

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity, the power of it not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for an alleged false representation, unless the falsity is certainly proved and unless the complainant has been deceived and injured by them."

Such an action would require a very harsh rule to be applied before a Court would set aside a transaction fully consummated without first showing the injury sustained clearly.

In the case of Union R. R. Co. vs. Dull, 124 U. S. 173, 31

L. Ed. 417, which is an action for the cancellation of a contract fully performed and where one of the parties had died and the surviving partner had brought suit to recover the amount due under such contract, and thereupon a new contract was made reciting the completion of the work under the former contract and reciting the claim of such surviving partner for the large balance due and disputed as to what was due, and agreeing to refer such dispute to arbitrators, and the decision of the arbitrators "to be final and conclusive". The arbitrators found the amount due such surviving partner, and thereupon he agreed to accept partial payments of such sums which were made and notes given accordingly, and such adjustment fully consummated, was sought to be set aside on the ground of fraudulent representations in relation to obtaining the original contract.

In the light of the foregoing conditions the Court declares on foot of pages 420 and 421, as follows:

> "The relief which the appellant seeks is entirely wanting in equity. The Company has had possession of the work done by the contractors since its completion in 1873. The contracts in question have been fully executed and restoration of the parties to their original rights has become impracticable, if not impossible. Nevertheless, the Company, holding on to all it has received, asks the court to declare void not only the award of 1876, the judgment of 1877, and the unpaid notes given in payment of that judgment, but the original construction agreements of 1871, and give a decree for a return of all that it paid in cash or on the notes. * * * and this, without suggesting fraud upon the part of the arbitrators, or proving that it has been in-

jured, pecuniarily, by anything that either the contractors or Ellicott did or said. The case comes within the rule laid down by this court in Atlantic D. Co. v. James, 94 U. S. 207, where it said: 'Canceling an executed contract as an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.' "

This is equally true in the case of Smith vs. Richards, *supra.*

The case of Clarke vs. White, cited on page 80 of appellants' brief, comes under the same rule, as that was a case to cancel certain notes, twenty-six in number, amounting to $7140.72, which had been paid by turning over goods and merchandise, under an agreement of compromise at 70c on the dollar, for which goods were received and retained and the transaction closed except the delivery of the notes. All of these cases show the reason why the rule there declared was laid down.

But this rule, we contend, does not apply to the case at bar, for in such a case it is only necessary to show that the party did not secure what he thought he was purchasing, and he is not required to allege and prove the actual pecuniary damages sustained before he can have the contract rescinded. While counsel for appellants, on page 78 of their brief, state that there is no charge, that they were damaged, and there is nowhere in the evidence any attempt on the

part of plaintiffs to show that they had suffered any pecuniary loss or damage by reason of alleged deceit. We contend that the gist of the action is not the amount of damages suffered, but that injury has resulted from the misrepresentation that has misled the appellees to enter into a contract to purchase property which they would not have done had they known the truth, and we feel that his contention is clearly sustained in the following cases:

In the case of MacLaren vs. Cochran, 44 Minn. 255, the Court says:

> "If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon the discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented."

And, in the case of Martin vs. Hill, 41 Minn. 343, which was an action to rescind a contract for the purchase of stock in the Company developing coal land, and the Court said:

> "It is to be borne in mind that the evidence as to the variance between his reports and the fact, is not for the purpose of assessing damages, but only to ascertain if the lands, as coal lands, were in fact so much less valuable than plaintiff had a right to believe and did believe them to be from the representations made to him by defendants, that, had they known the truth, they would not have made the purchase.

"The question of whether a money damage has been sustained by the party who has been induced to enter into a partnership relation through fraudulent representation has nothing to do with the decision of the case presented for the avoidance of the partnership agreement. The true principle by which the Court is to be guided in such a case is, that the party deceived has a right to have the agreement wholly set aside; if it has been obtained by fraud he is entitled to say that misrepresentations vitiate the contract."

The foregoing statement, we feel, is sustained in the following cases:

Harlow vs. LaBrum, 151 N. Y. 281.
Rawlins vs. Wicksham, 3 De Ge. & Jones.
Williams vs. Kerr, 152 Pa. St. 565-304.
Levick vs. Brotherline, 74 Pa. 149.
Harner vs. Fisher, 58 Pa. 453.

By a reference to page 6 of the record in the case at bar, it is alleged:

"Your orators were greatly deceived and injured by such false and untrue statements."

And on page 36 of the record in the answer of appellants, the denial of the above allegation is in the following language:

"Defendants deny that complainants were greatly or otherwise deceived or injured by said alleged or any false or untrue statements on the part of said defendants. * * * "

This allegation was placed there upon the theory that to

entitle one to equitable relief he must show that some right has been invaded, but that it is not necessary to show the actual pecuniary damages sustained thereby to be entitled to relief.

We think this will more fully appear in the case of W. Va. T. Co. vs. Standard Oil Co., 56 L. R. A., on page 807, where the Court presents the distinction between injury and damage, in these words:

> "We commonly use the words 'injury' and 'damage' indiscriminately * * * *Damnum* means only harm, hurt, loss, damage; while *injuria* comes from in, against, and *jus*, right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage."

And, we feel that this contention is fully sustained in the case of Mather vs. Barnes, et al., 146 Fed. 1004, where the Court uses the following language:

> "The purchaser is entitled to the bargain which he supposed and was led to believe that he was getting, and is not to be put off with any other, however good. It is of no consequence in the present instance, therefore, that the plaintiffs got coal lands of intrinsic value which are worth, perchance, all that was paid for them, if they were fraudulently induced to believe by representations for which the defendants are responsible that the * * * vein underlaid the whole property * * * ".

The foregoing clearly shows the rule that is applicable in a case similar to the one at bar.

Counsel on page 78 of appellants' brief state:

"That at the time this case was argued in the trial court, counsel for plaintiffs state to the trial judge that the case was tried upon the theory that it was unnecessary to allege or make proof of the actual loss in cases of this character."

In this statement we concur because counsel on both sides had tried the case upon that theory and such trial was had upon the theory stated on page 140, Vol. 14, Ency. of Law, 2d Edition, which is as follows:

"It has been held in a number of cases that to entitle a person to relief because of having been induced by fraud to enter into a contract, he need not show that he has actually sustained any pecuniary damages by reason of the fraud, provided he has been otherwise prejudiced."

And the author of this work further says:

"Thus it has been held that pecuniary damage is not necessary to entitle a person to relief by way of rescission, but that it is enough for him to show that he has been induced by material, false and fraudulent representation to enter into a contract which he would not have entered into but for such representation."

Our contention is further sustained in such cases as Wainscott vs. Occidental, Etc., Ass'n., 98 Cal. 253, which was an action for rescission, and on page 257 the Court says:

"He who would recover damages in a Court of law must set forth in an orderly manner the facts showing his right to recover, and the amount to which he is entitled, to the exclusion of every presumption to the con-

trary. In such an action the damages are the essential thing. In an action to rescind, upon the ground of fraud, the fraud is the essential thing, and while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance."

And then the Court cites the very cases from California upon which appellants seem to place so much stress.

And we further contend that appellants having answered and gone to trial upon the issues thus joined, waive any objections they might have been entitled to make in relation to this question.

This contention, we feel is fully sustained in the case of Potter vs. Taggart, 54 Wis. 399, which is an action to rescind a contract for the purchase of a note and mortgage upon the ground of misrepresentation, and on page 398 the Court says:

"Counsel * * * insists that the complaint does not show that the appellant was injured by the alleged fraudulent representations * * * and so fails to state any reason for rescission. * * * We are inclined to hold that after answer upon objection taken for the first time to its sufficiency, the complaint is sufficient. * * * The rule is well settled that a greater latitude of presumption may be indulged in to sustain a complaint where the objection that it does not state a cause of action is taken for the first time at the trial, and after an issue of fact has been taken upon it by answer, than where the same objection is taken by demurrer."

Therefore, in conclusion, we feel justified in stating that

the testimony conclusively shows that the appellees were misled by the statements of the appellant, Harry G. King, and had appellees not been so misled, they would not have entered into such contract, or paid the $21,000.00 or gave their notes for $19,000.00, and that such contract should be cancelled, such notes returned, for cancellation, and such money returned, and that in so doing no possible pecuniary injury can be done the appellant, as Mr. King still retains title and possession to the property in controversy; and the testimony also shows by appellant, Harry G. King, and their witnesses that these coal lands embraced in the contract are very valuable for farming purposes, and therefore the judgment rendered in the lower court should be sustained.

Respectfully submitted,

RICHARDS & HAGA,

Attorneys for Appellees.

No. 1914

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Appellants,

vs.

THE GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Eastern District of Washington, Eastern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1914

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Appellants,

vs.

THE GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Eastern District of Washington, Eastern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Names and Addresses of Attorneys of Record.

L. F. CHESTER, Esquire, Great Northern Railway Depot Building, Spokane, Washington,
Solicitor for the Complainant.

C. C. BRYANT, of Coulee City, Washington, and Messrs. POINDEXTER & MOORE, Peyton Building, Spokane, Washington.
Solicitors for the Defendants.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Amended Bill of Complaint in Equity.

To the Honorable Circuit Court of the United States for the Eastern District of Washington, Eastern Division:

The Great Northern Railway Company, hereinafter called plaintiff, by leave of the court first had and obtained, amends its original Bill of Complaint herein, and for such amendment, complaining of W. H. Tolliver and Sophronia Tolliver, hereinafter called the defendants, and respectfully represents to the Court:

I.

That plaintiff is a corporation, duly incorporated under the laws of the State of Minnesota, as a common carrier of freight and passengers, and is authorized as such, under the laws of the State of Washington, to carry on its business as such common carrier in said State last named, and has for many years been engaged as such common carrier with a line of railway extending through the States of Minnesota, North Dakota, Montana, Idaho and Washington, and is still so engaged in such business.

II.

That plaintiff has paid to the State of Washington its annual license fee last due.

III.

That defendants are husband and wife, and are citizens and residents of the State of Washington, residing in Grant County, in said State.

IV.

That plaintiff, as such common carrier, has a line

of railway extending through said Grant County, and has many trains passing each way daily, over said line, its passenger trains being engaged in the carriage of passengers, express, baggage, and United States Mail, and its freight trains engaged in carrying all kinds of freight, commonly tendered to common carriers, including many shipments of livestock and other perishable shipments.

V.

That plaintiff has now and for many years last past has had located at the station of Ephrata in said Grant County, a water-tank to supply its trains and engines with water, which said tank is and has at all times been supplied with water from a distant spring, known as Egbert Springs, and water is supplied from said spring, through pipe-line and a gravity system to its said water-tank at Ephrata, and there is no other means of supplying said tank at this time and could not for a long time to come, and it is impossible for plaintiff to operate its trains over said line of road in the discharge of its duties to the public as a common carrier without the constant use of this tank and the water supply through it from said spring.

VI.

That the plaintiff's line of railroad extending through said Grant County and on which its said water-tank is located was constructed and formerly owned by the St. Paul, Minneapolis & Manitoba Railway Company, but has been for many years operated by this plaintiff, and this plaintiff, on, to wit, the 11th day of October, 1907, became the owner of said

line of railway by purchase from said St. Paul, Minneapolis & Manitoba Railway Company.

VII.

That practically all the land located between said water-tank at Ephrata and said Egbert Spring was, on and prior to the 23d day of August, 1892, owned by one J. F. Beazley and wife, Latella Beazley, and at and prior to said last-named date said spring was understood and believed by said Beazley and said St. Paul, Minneapolis & Manitoba Railway to be located on said land owned by Beazley, and the said Beazley and wife, on said 23d day of August, 1892, by their written conveyance for a valuable consideration, to wit: Twenty-five Hundred ($2,500.00) Dollars, conveyed to said St. Paul, Minneapolis & Manitoba Railway Company, an easement over and across said land to said spring, for the location of a three (3) inch pipe-line to be connected with said spring and said water-tank, for the purpose of supplying said tank with water from said spring, and said pipe-line was thereupon, in pursuance with said easement and right granted by said Beazley and wife, located across said land, connecting said spring with said water-tank, and has, ever since, been so connected therewith, and in constant daily use until the occurrence of the events hereinafter alleged. Said conveyance from said Beazley and wife was duly filed in the Auditor's Office of Douglas County, which at said time included the territory now known as Grant County on the 24th day of August, 1892, and duly recorded therein.

VIII.

That the spring above referred to, instead of being

located upon Beazley's land, heretofore referred to, is located upon the Northwest quarter of the Northeast quarter of Section Sixteen (16), Township Twenty-one (21), North range Twenty-six (26) East, and was, prior to the 29th day of September, 1899, a part of the State School Land, and as such belonged to the State of Washington, and at some time subsequent to said last named date, the exact time plaintiff is unable to give, one Jesse Cyrus entered into a contract with the State of Washington, in the manner provided by law, for the purchase of said tract of land. That on said 29th day of September, 1899, the said Jesse Cyrus, by his written conveyance of said last named date, for the sum of Five Hundred ($500.00) Dollars, conveyed to said St. Paul, Minneapolis & Manitoba Railway Company, the easement to said pipe-line over his portion of the land upon which the same was located, connecting the same with said spring, confirming to said St. Paul, Minneapolis & Manitoba Railway Company, all the rights it had acquired under the conveyance from Beazley and wife, heretofore referred to, and granting to said company the privilege and right to increase said pipe-line from three (3) inches to four (4) inches in diameter and conveying to said company the perpetual right to take from said spring, through said pipe-line, all the water that would flow through the same, for the supply of said water-tank at Ephrata, with the usual covenants of warranty in the conveyance of land. Said last named conveyance was duly filed for record in the Auditor's office of Douglas County, Washington, on the 10th day of October,

1889, and duly recorded therein, a copy of which is hereto attached, marked exhibit "A," and made a part hereof.

IX.

That plaintiff by the terms of conveyance from said St. Paul, Minneapolis & Manitoba Railway Company, hereinbefore referred to, became the owner of all the rights, acquired by said St. Paul, Minneapolis & Manitoba Railway Company, by reason of the conveyance from Beazley and Cyrus.

X.

Plaintiff further alleges that in the year 1892, and while said land belonged to the State of Washington, and before anyone else had acquired any right to appropriate the water from said spring now and heretofore being taken and appropriated by it, the said St. Paul, Minneapolis & Manitoba Railway Company constructed and connected its pipe-line therewith, and did actually divert therefrom and appropriate for said railroad purposes through said pipe-line and water-tank, all the water needed for its said railroad purposes, and same has been in constant use and said St. Paul, Minneapolis & Manitoba Railway Company, and plaintiff, as its successor, has had open, notorious, peaceable and uninterrupted possession, use and enjoyment thereof, down to the present time, save and except the interruptions and molestations by defendants, as herein set forth, and plaintiff is informed and believes, and so alleges the fact to be, that it is entitled to the use of said water independently of its transaction with Beazley and Cyrus.

XI.

That on or about the 20th day of February, 1908, the said Jesse Cyrus transferred to W. H. Tolliver, one of the defendants herein, his said contract of purchase, from the State of Washington, of said land, and thereafter on or about the 25th day of February, 1908, in pursuance of said contract with said Jesse Cyrus, and the transfer thereof by Cyrus to said W. H. Tolliver, the State of Washington executed and delivered to said Tolliver a deed to said land.

XII.

That on, to wit, the 26th day of October, 1909, the defendants here instituted an action in the Superior Court of the State of Washington, for Grant County, against this plaintiff for the sum of Two Thousand ($2,000.00) Dollars, damages, on account of the location of its said pipe-line across the land claimed by plaintiff, and its connection with said spring, seeking to oust plaintiff from said land and to perpetually enjoin it from the further use of the water from said spring. That thereafter and within the time provided by law, this plaintiff presented to said Superior Court of Grant County, Washington, its petition and bond, conditioned and made payable as provided by law, for the removal of said cause from said Superior Court of Grant County, Washington, to this Court, which said bond was duly approved by said court and order made on the 23d day of November, 1909, transferring said cause to this court. That the record of said cause has now been filed in this court and the cause is pending herein.

XIII.

That after said order of removal of said cause had been made and prior to the filing of the record herein, and prior to the granting of the former restraining order herein, defendants wholly disregarding the rights of this plaintiff in the premises, and without any cause or justification, have gone upon the land and wrongfully disconnected plaintiff's said pipe-line from said spring, cutting off the supply of water from plaintiff's said tank, at Ephrata, and plaintiff was experiencing the greatest difficulty in getting its trains over the road, and because of the fact there is no other means of supplying its engines and trains with water at said station, nor for many miles on either side thereof, it was and will be greatly hampered and embarrassed and possibly prevented from getting many of its trains over the road for the lack of water for its engines at said place.

XIV.

Plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that if not restrained, defendants will again persist in disconnecting said pipe-line and shutting off said water supply, and plaintiff will be subjected thereby to great and irreparable damage and injury.

XV.

That the amount in dispute and the value of the property in controversy herein exceeds the sum of Two Thousand ($2,000.00), Dollars, exclusive of interest and costs.

XVI.

That the damages plaintiff will sustain cannot be

ascertained or calculated, even if defendants should be sufficiently solvent to respond thereto, and plaintiff is therefore in consideration of all the premises herein before alleged without any legal remedy.

In consideration whereof, and forasmuch as your petitioner, plaintiff herein, is remediless in the premises, and by a strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and reviewable, plaintiff prays your Honors to grant unto it a Writ of Subpoena, issuing out of and under the seal of this Honorable Court, to be directed to said W. H. Tolliver and Sophronia Tolliver, commanding them, and each of them, on a certain day and under a certain penalty, in said writ to be inserted, personally to be and appear before your Honors in this Honorable Court, and then and there, full, true and correct answers make, answer under oath being waived, to all and singular the premises, and further to stand, to conform and abide such further orders, directions, and decrees therein, as to your Honorable Court shall seem meet and shall be agreeable to equity and good conscience; that the said defendants, W. H. Tolliver and Sophronia Tolliver, their agents, attorneys, representatives, employees, and each of them, be restrained and enjoined under the pain and penalties of the law, from in any manner interfering with plaintiff's free and uninterrupted use and enjoyment of the water from said spring through said pipe-line to its tank at Ephrata, until the further order of this court, and that upon final hearing said injunction be made perpetual and for all orders and process neces-

sary and proper in the premises and for general relief.

(Signed) GREAT NORTHERN RAILWAY COMPANY.
By L. F. CHESTER,
J. J. LAVIN,
Its Attorneys.

Exhibit "A" [to Amended Bill].

THIS INDENTURE, made this 29th day of September in the year of our Lord one thousand eight hundred and ninety-nine, by and between Jesse Cyrus, a single man of Egbert Springs, in the County of Douglas and State of Washington, party of the first part, and the Saint Paul, Minneapolis and Manitoba Railway Company, a corporation, party of the second part.

WITNESSETH, That the said party of the first part for and in consideration of the sum of FIVE HUNDRED ($500.00) Dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said party of the second part, the right to enlarge the capacity of a certain supply pipe running from the water tank of the said party of the second part on its line of railroad at Ephrata Station, to the spring or springs known and designated as "Egbert Springs," in the northeast quarter of section sixteen (16), in Township twenty-one (21) North of Range twenty-six (26) East of Willamette Meridian, in the County of Douglas and State of Washington, from a diameter of three (3) inches, as now granted to said party of

the second part by a certain deed of conveyance from one J. F. *Beezley* and wife to the said party of the second part, dated the 23rd day of August, A. D., 1892, and recorded in the office of the County Auditor of said Douglas County, Washington, in Volume "B" of Miscellaneous records on page 48, to a diameter of four (4) inches, inside measurement. Together with the right to so much of the water of said Egbert Springs as will naturally flow through said four (4) inch pipe; the water to be used by the said party of the second part for railway purposes only.

This conveyance is made subject to the same conditions and provisions as contained in said deed from J. F. *Beezley* and wife to the said party of the second part above referred to.

TO HAVE AND TO HOLD THE SAME, together with all the rights, privileges and appurtenances thereunto belonging to the said party of the second part, its successors and assigns forever. And the said party of the first part, for himself, his heirs, administrators and assigns, does covenant to and with the said party of the second part, its successors and assigns, that he is well seized in fee of said water rights and privileges and has the right to convey the same, and that the same are free from all incumbrances, and the above granted water rights and privileges in the quiet enjoyment and peaceable possession of the said party of the second part, its successors and assigns, in perpetuity against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will forever WARRANT AND DEFEND.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JESSE CYRUS. [Seal]

Signed, sealed and delivered in presence of

W. O. PARR.

F. W. RELF.

State of Washington,
County of Kittitas,—ss.

I, W. O. Parr, a Notary Public in and for the State of Washington, do hereby certify that on this 29th day of September, A. D. 1899, personally appeared before me Jesse Cyrus, to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 29th day of September, A. D. 1899.

[Notarial Seal] W. O. PARR,

Notary Public in and for the State of Washington,
Residing at Wenatchee, in County of Kittitas.

Filed for record in Douglas County, Oct. 10th, 1899, in Volume M of Deeds, on page 212.

State of Washington,
County of Spokane,—ss.

J. J. Lavin, being duly sworn, on oath says: That he is one of the attorneys for the plaintiff, Great Northern Railway Company, in the above-entitled cause; that he has read the foregoing amended complaint, knows the contents thereof, and believes the

same are true, except such parts as are stated on information and belief, and those he believes to be true.

That defendant is a foreign corporation, and has no officer or agent within the county aforesaid, authorized to make the verification, other than its attorneys, one of whom is affiant, who is duly authorized so to do; that this verification is made by the affiant for the reasons hereinbefore stated, and because the material allegations in said pleading are within deponent's knowledge.

(Signed) J. J. LAVIN.

Subscribed and sworn to before me this 8th day of February, 1910.

[Notarial Seal]

(Signed) M. M. KELLINGER,

Notary Public in and for the State of Washington, Residing at Spokane, Wash.

[Endorsements]: Amended Bill of Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. February 8, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Stipulation [Re Demurrer to Amended Bill].

It is hereby stipulated and agreed by and between the Great Northern Railway Company, a corporation, plaintiff, and W. H. Tolliver and Sophronia Tolliver, his wife, defendants, that the original demurrer filed by the defendants as a pleading in this cause shall stand against plaintiff's amended complaint in this cause, and that judgment sustaining or overruling said demurrer shall have the same force and effect as if the same were pleaded against the said amended complaint as "demurrer of defendants to plaintiff's amended complaint."

Stipulated and agreed this 11th day of February, 1910.

(Signed) GREAT NORTHERN RAILWAY COMPANY, a Corporation,
By L. F. CHESTER,
Its Attorney.

(Signed) W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,
By C. C. BRYANT,
Their Attorney.

[Endorsements]: Stipulation. Filed in the U. S. Circuit Court for the Eastern District of Washington. February 17th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

IN EQUITY—No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Demurrer.

Come now the defendants, W. H. Tolliver and Sophronia Tolliver, his wife, for the special purpose and no other, until the question raised is decided, of objecting to the jurisdiction of this court, and questioning the right of plaintiff herein, by protestation and not acknowledging all or any part of the allegations and things in complainant's bill of complaint contained to be true in any such manner and form as the same are set forth and alleged therein, and demur to the bill, and for cause of demurrer show:

I.

That it appears by complainant's own showing in the said bill, that it is not entitled to the relief prayed for in said bill against these defendants.

II.

That it appears from said bill of complaint of complainant that this Court has no jurisdiction to hear and determine this action.

a. That the amount involved in this controversy is less than Two Thousand ($2,000.00) Dollars, and is not sufficient to give jurisdiction to this Court in this case.

b. That this Court is denied jurisdiction herein and precluded from a hearing of this action by reason of Section Seven Hundred Twenty (720) of the Revised Statutes of the United States.

III.

That said bill of complaint is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing on said bill of complaint, defendants demur thereto, and pray a judgment of this Honorable Court and that they shall not be compelled to make any or further answer to said bill, and humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

(Signed) C. C. BRYANT and
DANIEL T. CROSS,
Attorneys for Defendants.

State of Washington,
County of Grant,—ss.

Before me, W. H. Tolliver, being first duly sworn, on oath says that he is one of the defendants in the above-entitled action; that he has read the foregoing demurrer, knows the contents thereof; and that said demurrer is not interposed for delay and that it is true in point of fact.

(Signed) W. H. TOLLIVER.

Subscribed and sworn to before me this 8th day of December, 1909.

(Signed) DANIEL T. CROSS,
Notary Public in and for the State of Washington,
Residing at Ephrata.

I. C. C. Bryant, one of the attorneys for the defendants in the foregoing styled cause, hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) C. C. BRYANT.

[Endorsements]: Demurrer to Bill of Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. December 11th, 1909. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Opinion [on Demurrer to Amended Bill].

L. F. CHESTER and J. J. LAVIN, for Complainant.

C. C. BRYANT, for Defendants.

WHITSON, District Judge.

The following is a summary of the allegations contained in the amended bill of complaint:

Complainant, as a common carrier of passengers and freight, owns and is operating a line of railroad with, among others, a station at Ephrata. At said station it maintains a tank for supplying its trains and engines with water. This tank is supplied by gravity flow through a pipe-line from what is known as "Egbert Spring." This railroad was formerly owned by the St. Paul, Minneapolis & Manitoba Railway Company, complainant having succeeded to the ownership by purchase on the 11th day of October, 1907. Upon the 23d day of August, 1892, one Beazley and his wife, in consideration of $2500.00 to them paid, granted and conveyed by written deed to complainant's predecessor, an easement over and across their land to said spring for the location of a three-inch pipe-line to connect the spring and tank for the purpose of supplying the latter with water, in pursuance of which the pipe-line was located and built and has ever since been in constant and daily use except when interrupted by defendants as hereinafter recited. At the time of taking this deed from Beazley and wife it was supposed that the spring was located upon their land, but it was subsequently discovered that it is situate on the Northwest Quarter of the Northeast Quarter of Section 16, Town-

ship 21, North of Range 26, east, which adjoins the Beazley tract. Prior to September 29th, 1899, this land was state school land and subsequent to this date one Jesse Cyrus, having entered into a contract with the State for the purchase of the tract upon which the spring is situate and while holding under said contract, in consideration of $500 to him paid by the predecessor in interest of complainant, confirmed by written conveyance dated September 29, 1899, all rights acquired under the conveyance of Beazley and wife and granted the privilege and right to increase the size of the pipe-line, to maintain the same and to divert so much water as would naturally flow through said pipe as enlarged, which deed was filed for record on the 10th day of October, 1899, in the county wherein said land was then situate. In the year 1892, while said land belonged to the State of Washington and before anyone had acquired a right to appropriate, the predecessor in interest of complainant did appropriate the waters of said spring and actually diverted the same through said pipe-line in virtue of which also the right to the continued use thereof is claimed. On or about the 20th day of February, 1908, Cyrus assigned his contract to the defendant, W. H. Tolliver, who on the 25th day of February, 1908, in virtue of such assignment received a deed from the State. Afterwards the defendants instituted an action in the Superior Court of the State of Washington, County of Grant, for $2,000 damages on account of the location and maintenance of the pipe-line across the lands thus acquired from the State, seeking to oust the complain-

ant from said land and they subsequently cut off the flow of water.

An examination of the files of the above-mentioned case, since its commencement removed to this court, shows that the purpose of the suit was to enjoin the use of the right of way and diversion of the waters of said spring, and for incidental damages. The purpose of this suit is to enjoin interference with the use of the pipe-line and the water carried thereby.

The demurrer to the original complaint, which by stipulation is made to apply to the amended bill, is based upon three grounds.

FIRST. Want of equity.

SECOND. Want of jurisdiction: (a) that there is involved less than the amount required to give it; (b) that the court is denied jurisdiction under Section 720 of the Revised Statutes of the United States. That section provides that a writ of injunction shall not be granted to stay proceedings in any state court. Manifestly, it can have no application to the present issue. As to the amount, the demurrer to the original bill was sustained for failure to allege that more than $2,000, exclusive of interest and costs, was involved. That has been cured by amendment.

We are thus left with one ground of demurrer to be considered.

Counsel for complainant rest the right to relief upon estoppel arising out of the warranty deed made by Cyrus while holding under the State as well as upon an appropriation of water made in 1892, some seven years before Cyrus contracted to purchase the land. The argument that the defendants are es-

topped is met by the contention that the doctrine of after acquired title can have no application, for that Cyrus never having acquired title his warranty cannot conclude the defendants here who did not join in the conveyance. The principle is well settled that one who, without title, conveys by warranty deed, is estopped from disputing the title of his grantee and a title subsequently acquired inures to the benefit of the latter. Strictly speaking, therefore, since the defendants have given no assurance, there is nothing which can directly operate upon them by way of estoppel. It does not necessarily follow, however, that they have acquired a better right than the complainant. The right to an easement upon the land and to appropriate the water of the spring, as well as the status of the defendants growing out of their relation to Cyrus as his assignee must necessarily be discussed together.

Since Atchison vs. Peterson, 20 Wallace, 509, Basey vs. Gallagher, 20 Wallace, 670, Jennison vs. Kirk, 98 U. S. 456, and Broder vs. Water Company, 101 U. S. 274, it has been the settled rule that the Act of Congress of 1866 was not intended as a grant of the right to appropriate water upon the public domain, but was rather the recognition of a pre-existing right which had grown up by custom. This doctrine has been often reaffirmed by the highest court of this state.

Thorp vs. Tenem Ditch Co., 1 Wash. St. 566.

Benton vs. Johncox, 17 Wash. 277.

Offield vs. Ish, 21 Wash. 277.

Longmire vs. Smith, 26 Wash. 439.

No good reason appears why the same rule should not apply to public lands of the State, and indeed the State has provided by express enactment (Session Laws 1891, Sec. 4091 Ballinger's Code), that the water of any lake, pond or flowing spring in the State may be acquired by appropriation. But as applied to the general government, we have seen that the federal statute did not create the right, and the conclusion must follow that the State statute was not intended to create the right. Both recognized prior existing custom and that such statutes as that of this State were not intended as a denial of the right to appropriate except by compliance with the methods pointed out, is settled beyond controversy.

Long on Irrigation, sec. 39.

Murray et al. vs. Tingley, 50 Pac. 723.

Wells vs. Mantes et al., 34 Pac. 324.

Cruse vs. McCauley, 96 Fed. 370.

DeNecochea vs. Curtis, 20 Pac. 563; reaffirmed 22 Pac. 198.

Burrows vs. Burrows et al., 23 Pac. 146.

Watterson vs. Saldunbehere, 35 Pac. 432.

In view of the custom the right to divert and use water from the sources mentioned in the statute must by fair intendment be held to mean the right to go upon the public lands of the State to carry out the taking thereof, for it is to be remembered that the State could not grant the right to go upon private lands without providing for compensation. So construing the State statute it becomes apparent that the mention of the purpose for which an appropriation may be made in the method there pointed out,

namely, irrigation, mining or manufacturing, was not intended as a limitation upon the right to appropriate for other beneficial uses. The custom in the Pacific States and territories does extend to such uses. What is a beneficial use has not often been defined, but the right to appropriate water for any beneficial purpose has been uniformly recognized in the western country.

Northport Brewing Co. vs. Parrot, 22 Wash. 243.

Twohey vs. Campell, 60 Pac. 396.

Lux vs. Haggin, 10 Pac. 674.

Gould on Waters (3rd Ed.), 452.

Nevada Ditch Co. vs. Bennett, 45 Pac. 472.

Long on Irrigation, sec. 47.

The taking of water and devoting it to the purpose to which it is alleged to have been devoted in this case is the taking for a beneficial use. A little consideration will show how utterly inconsistent it would be for the State to recognize the right to appropriate upon the lands of the federal Government and deny the right to appropriate upon its own lands. In view of the history of western development and the growth and application of the doctrine of appropriation it would take an express, prohibitory enactment to justify the conclusion that waters upon the public lands of the State are not open to appropriation the same as the public lands of the United States, and particularly so since the source of the water supply thereon has been made available. So it was held in Thorp vs. Tenem Ditch Co., *supra,* that the local statute of Yakima County of 1873 (Session Laws of

that year, p. 520), which only in terms granted to *land owners* the right to appropriate, was not intended to restrict the right of prior appropriation as it existed by local customs and decisions of courts, and that it was immaterial whether the appropriator was a land owner or not. That decision declares the rule of this State. It is a rule of property which the federal courts are bound to follow.

In Long on Irrigation, sec. 25, it was said:

"It is accordingly held in these States that the doctrine of appropriation belongs to, and only to, water on the public lands belonging either to the State or to the United States," etc.

To the same effect see:

Weil on Water Rights, sec. 76.

Lux vs. Haggin, 10 Wash. 674.

It follows that the mention of the purposes for which an appropriation may be made under section 4091 was not intended to exclude the right to take for other beneficial uses. We have already seen that the statute did not limit appropriators to the procedure there pointed out. The section above noted is silent as to the right of a corporation to appropriate, but section 4092 in part reads, "Any person, corporation or association desiring to appropriate water," etc., which is a clear recognition of the right of a corporation to appropriate water.

But the railroad company may rest upon a specific statutory enactment. Section 4334 of Ballinger's Code expressly grants the right to appropriate a sufficient quantity of land granted to the state for university, school or other purposes and for the

"necessary sidetracks, depots and water stations and the right to take water thereto by aqueduct." The railroad company, then, when it entered upon unclaimed and unoccupied school land was not a trespasser. The right of way to take water across such lands by aqueduct was expressly granted. Whether it should have paid the State was a matter between itself and the State. When Cyrus entered into a contract to buy the land he found the pipe-line there and observed that the water of the spring was being diverted by means of it. So far as he was concerned he confirmed the right. If the language of section 4334 is not broad enough to include the right to appropriation of water (and I think it is), the right existed by custom. The right of way was complete by grant. Again, any compensation which might be due for the taking of the right of way vested in the State. Damages in such cases are personal to the owner at the time the injury occurs. They do not pass by deed unless expressly included.

Roberts vs. Railroad Co., 158 U. S. 10, and cases there cited.

Northern Pac. vs. Murray, 87 Fed. 651 (Ninth Circuit).

It does not appear that the compensation, if any, which the State was entitled to for the right of way ever passed by the deed to defendants. I have failed to discover any statute which contemplated the payment of anything by way of compensation to the State. But however this may be, in view of the rule of the cases last cited it would have to affirmatively appear that the claim for damages was transferred

before the defendants could even prosecute their action to recover damages, for the presumption is that a deed does not contain so unusual a provision. In any event, they could not enjoin the use of the premises, nor, if my conclusion is correct, the diversion of the water for a beneficial use. The purchaser from the State found certain physical conditions. He observed a pipe-line carrying the water of the spring which had its source upon the land which he agreed to purchase. Suppose that he had found excavations which had been wrongfully made there; that waste had been committed upon the premises, such as the cutting and carrying away of timber, the removal of stone, or the like, he could not by subsequently acquired title follow the various trespassers and recover of them. Finally, I should doubt whether a private individual, though I do not find it necessary to decide that point, could raise the question as to who may or may not appropriate water as against one in possession applying the same to a beneficial purpose. All of the foregoing without regard to the question whether the defendants holding by assignment from Cyrus took any greater rights than he himself had at the time of the assignment.

These conclusions must lead to overruling the demurrer, and an order will go accordingly.

[Endorsements]: Opinion on Demurrer to Amended Bill of Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. March 3d, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Order [Overruling Demurrer, etc.].

On the 9th day of February, 1910, came on to be heard defendants' demurrer to plaintiff's amended complaint, and the Court, after having taken the matter under advisement and fully considered the same, is of opinion that said demurrer should be, and the same is hereby overruled, and the defendants are ordered and directed to answer said complaint by the next rule day, being April 4, 1910. Defendants except. Exception allowed.

Done in open court this 7th day of March, 1910.

(Signed) EDWARD WHITSON,

Judge.

[Endorsements]: Order Overruling Demurrer to Amended Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. March 7th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Answer to Amended Bill of Complaint.

Come W. H. Tolliver and Sophronia Tolliver, his wife, defendants above named, and answer the amended bill of complaint of the above-named complainant as follows:

These defendants now, and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, for answer thereto, or to so much thereto as these defendants are advised it is material or necessary for them to make answer to, answering say:

1. It is true that the complainant is a corporation incorporated under the laws of the State of Minnesota as a common carrier of freight and passengers,

and is authorized as such under the laws of the State of Washington to carry on its business as a common carrier in this State, and has for many years been engaged as such common carrier with a line of railway extending through the States of Minnesota, North Dakota, Montana, Idaho and Washington.

2. Defendants have no knowledge or information as to whether or not the complainant has paid to the State of Washington its annual license fee last due, except the allegation of that fact contained in the amended bill of complaint, which allegation defendants accept as true.

3. It is true that these defendants are husband and wife and are citizens and residents of the State of Washington, residing in Grant County, in said State.

4. It is true that complainant as such common carrier has a line of railway extending through Grant County, Washington, and has numerous trains passing each way daily over said line, its passenger trains being engaged in the carrying of passengers, express, baggage and United States Mail, and its freight trains being engaged in the carrying of freight of various kinds, including shipments of live-stock and other perishable property.

5. It is true that for some years past the complainant has maintained a water-tank at the station of Ephrata, in the said Grant County, which it has used to supply its trains and engines with water, which said tank has during said time been supplied with water from the spring situate on the premises of these defendants, known as Egbert Springs, the

water being supplied by gravity through a pipe-line extending from said water-tank to a point on the land of these defendants where the water flowing through said pipe-line is diverted from said spring. It is not true, however, that there is no other means of supplying said tank with water and it is not true that complainants could not, for a long time to come, supply its said water-tank from any other source, and it is not true that it is impossible for said complainant to operate its trains over said line of road in the discharge of its duties to the public as a common carrier without the constant use of this tank and the water supply brought to said tank from said spring.

6. That defendants have no knowledge or information as to whether or not the complainant on the 11th day of October, 1907, or at any time became the owner of said line of railway by purchase from the said St. Paul, Minneapolis & Manitoba Railway Company other than the allegation to that effect contained in amended bill of complaint, which allegation defendants accept as true.

7. It is not true that practically all or any of the land located between the said water-tank at Ephrata, Washington, and said Egbert Spring was on and prior to the 23d day of August, 1892, owned by one J. F. Beazley and Latella Beazley, his wife; and it is not true that on and prior to the 23d day of August, 1892, said spring was understood and believed by said Beazley and St. Paul, Minneapolis & Manitoba Railway Company to be located on any land owned by said Beazley and wife; it is not true that the said

Beazley and wife, on the 23d day of August, 1892, or at any other time, by a written or other conveyance, for a valuable, or other consideration, or at all, conveyed to said St. Paul, Minneapolis & Manitoba Railway Company an easement over and across said land to said spring for the location of a three inch, or any other size, pipe-line to be connected with said spring and said water-tank for the purpose of supplying said tank with water from said spring; and it is not true that said pipe-line was, in pursuance with said alleged easement and right granted by said Beazley and wife, located across said land so as to connect said spring with said water-tank; and it is not true that by virtue of said alleged easement granted by Beazley and wife, complainant, or his predecessor in interest, has since said date or at all maintained and constantly used said pipe-line during the period alleged in the complaint. These defendants, on the other hand, allege the fact to be that on, and for a long time subsequent to, the 23d day of August, 1892, the title to the lands and premises described in the amended bill of complaint and likewise all of the land situate between said water-tank and said Egbert Spring was vested in, owned and held by the State of Washington as school lands by grant from the United States, under, by virtue and subject to the restrictions of sections 10 and 11 of the Enabling Act of the State of Washington, sections 1 and 2 of Article 16 of the Constitution of the State of Washington, and section 5 of Chapter 11, of the 1893 Session Laws of the State of Washington; section 5505 Ballinger's Code.

8. It is true that said Egbert Spring was and is located upon the Northwest Quarter (NW. ¼) of the Northeast Quarter (NE. ¼) of Section Sixteen (16), Township Twenty-one (21) North, Range Twenty-six (26) E. W. M., and was prior to the 29th day of September, 1899, and was at all times prior to the 25th day of February, 1908, a part of the school lands of the State of Washington, and as such belonged to and was owned by the State of Washington, under and by virtue of the aforesaid sections 10 and 11 of the Enabling Act, sections 1 and 2 of Article 16 of the Constitution of the State of Washington, and section 5 of Chapter 11 of the 1893 Session Laws of the State of Washington; section 5505 Ballinger's Code; it is true that subsequent to the 29th day of September, 1899, to wit, on the 27th day of October, 1905, one Jesse Cyrus entered into an executory contract with the State of Washington for the purchase of said last described tract of land, subject to the conditions and restrictions provided by law; and it is true that on said 29th day of September, 1899, the said Jesse Cyrus made and entered into a written agreement with the said St. Paul, Minneapolis & Manitoba Railway Company respecting said pipeline and the waters of said spring, a copy of which, marked Exhibit "A," is attached to the amended bill of complaint, and defendants allege that the fee simple title to said premises being at that time vested, as above set forth, in the State of Washington, and said Cyrus not being at that time possessed of any right or equity whatever in or to said premises, said written instrument so made and executed

by said Jesse Cyrus as aforesaid was and is wholly void and of no effect.

9. It is not true that the complainant did or could, by the terms of any conveyance from the St. Paul, Minneapolis & Manitoba Railway Company have become the owner of any rights whatever through said Beazley or said Cyrus, or anyone else, in or to any portion or part of the aforementioned premises, or in or to any portion or part of the waters of said spring, or to any easement or license to maintain a pipe-line over and across any portion or part of said premises, and defendants allege that said or any conveyance from the St. Paul, Minneapolis & Manitoba Railway Company to said complainant was and is, in so far as it may refer to, or by its terms affect the above referred to premises, property and property rights, wholly void and of no effect.

10. It is true that in the year 1892, and while said lands belonged to the State of Washington, subject to the legal restrictions and qualifications above alleged and before anyone had acquired a right to appropriate any portion or part of the waters flowing from said spring, the said St. Paul, Minneapolis & Manitoba Railway Company, without any right or authority whatever so to do, constructed and connected a pipe-line therewith, and did actually divert therefrom through said pipe-line and water-tank and use for its said railroad purposes a portion of the waters flowing from said spring; and it is true that said water has been constantly used since said date, first, by said St. Paul, Minneapolis & Manitoba Railway Company and subsequently by the complainant herein, which said use has been open, notorious,

peaceable and uninterrupted save and except for the interruptions and molestations of these defendants complained of in said amended bill of complaint, which said use, possession and enjoyment by the complainant these defendants allege was at all times merely permissive, and without right or authority whatever on the part of the complainant.

11. It is true that on or about the 20th day of February, 1908, the said Jesse Cyrus transferred to the said W. H. Tolliver, one of the defendants herein, said contract of purchase from the State of Washington to the said lands; and it is true that thereafter, on or about the 25th day of February, 1908, pursuant to said contract with said Jesse Cyrus and the transfer thereof by Jesse Cyrus to said W. H. Tolliver, the State of Washington executed and delivered to said Tolliver a deed to said land, by the terms and conditions of said deed, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, these defendants became, ever since have been and now are the absolute owners in fee simple of said Northwest Quarter NW. ¼ of the Northeast (NE. ¼), Section Sixteen (16), Township Twenty-one (21) North, Range Twenty-six (*6*), E. W. M., Grant County, Washington, with all the appurtenances thereunto appertaining.

12. It is true that on the 26th day of October, 1909, these defendants instituted an action in the Superior Court of the State of Washington, for Grant County, against the complainant herein for the sum of Two Thousand ($2,000.00) Dollars, damages on account of the location of said pipe-line across the lands of these defendants and its connec-

tion with said spring, thereby seeking to oust complainant from said land and to further enjoin it from the further use of the water from said spring. That thereafter, and within the time provided by law, this complainant presented to the Superior Court of Grant County, Washington, its petition and bond, conditioned and made payable as provided by law, for the removal of said cause from the State Superior Court of Grant County, Washington, to this Court, which said bond was duly approved by said court, and an order was made on the 23d day of November, 1909, transferring said cause to this Court, the record of which said case has been filed in this Court and said cause is now pending herein.

13. It is true that these defendants having, as they then and now verily believe, the right so to do, did at the date referred to in paragraph thirteen (13) of said amended bill of complaint, disconnect said pipe-line at a point where it extended over across the above-described lands of these defendants, thereby cutting off the supply of water from complainant's said water-tank at the town of Ephrata; but, the defendants deny that complainant was thereby caused the greatest, or any, difficulty in getting its trains over its said railroad; and it is not true that there are no other means of supplying the engines and trains of the complainant with water at said station nor for many miles on either side thereof; and it is not true that complainant was and will be greatly hampered and embarrassed, or by any means, prevented from getting many or any of its trains over said road from the lack of water for its engines at said place; and defendants allege that

they are engaged in fruit-raising and irrigation farming, and now irrigate a large area of land by means of the water flowing from said spring, which said area is being increased and will be increased by these defendants from time to time provided they are permitted to have the unrestricted use of the water flowing from said spring, and that in addition to the use of the water flowing from said spring for the purpose of irrigating, these defendants are the owners of the water system, by which water is supplied for domestic and municipal purposes to people of the town of Ephrata, Washington, the said town of Ephrata, Washington, being a place of several hundred inhabitants, and all of the water used for the said purposes is taken from the said described spring and the stream flowing therefrom, and that the said town of Ephrata has no other source of water supply, and that the full capacity of said spring and the stream of water flowing therefrom is necessary to the proper and suitable irrigation of the lands of these defendants immediately surrounding said spring, and for the purpose of supplying water for domestic and municipal purposes to the inhabitants of the said town of Ephrata, and that if the complainant is allowed to prevail in this action, these defendants will, for the reason aforesaid, be greatly and irreparably damaged, and that there is no standard of measurement for the pecuniary damage which these defendants would suffer by reason of being deprived of the use and ownership of the waters flowing from said spring; and defendants allege that complainant has an adequate remedy at law for establishing and protecting of any right which

it may have or which it seeks to have established in this suit in equity.

14. It is not true that complainant would be subjected to great and irreparable, or any other damage whatever, by the shutting off of said water supply.

15. It is true that the amount in dispute herein exceeds the sum of Two Thousand ($2,000.00) Dollars, exclusive of interest and costs.

16. It is not true that the complainant will suffer unascertainable damages, or any damage whatever, by reason of any act, or contemplated act or acts of these defendants. It is not true that complainant is without any legal remedy.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they or either of them are by said bill charged; without this, that there is any other matter, cause or thing in the said complainant's said amended bill of complaint contained material or necessary for these defendants to make answer unto, and not here or hereby well and sufficiently answered, confessed, traversed and avoided or denied, strictly within the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) C. C. BRYANT and
POINDEXTER & MOORE,
Solicitors and Counselors for Defendants.

State of Washington,
County of Grant,—ss.

W. H. Tolliver, being first duly sworn, on oath deposes and says: That he is one of the above-named defendants; that he has read the above and foregoing answer and that he knows same to be true, except as to those things alleged therein on information and belief, and that as to those matters and things, he believes the same to be true.

(Signed) W. H. TOLLIVER.

Subscribed and sworn to before me this 1st day of April, A. D. 1910.

[Notarial Seal]

(Signed) DANIEL T. CROSS,
Notary Public in and for the State of Washington,
Residing at Ephrata, Washington.

Exhibit "A" [To Answer to Amended Bill].

DEED.

-5157 26074.

STATE OF WASHINGTON.

IN CONSIDERATION of Sixteen Hundred Forty and no/100 ($1640.00) Dollars, the receipt of which is hereby acknowledged, the State of Washington does hereby grant, bargain, sell and convey unto W. H. Tolliver, his heirs and assigns, the following described school lands, situate in Douglas County, Washington, to wit:

The northwest quarter of the northeast quarter of section 16, township 21 north, range 26 east of the Willamette Meridian, containing forty acres, more

or less, according to the government survey thereof.

TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the said W. H. Tolliver, his heirs and assigns forever.

WITNESS the Seal of the State, affixed this 25th day of February, 1908.

ALBERT E. MEAD,
Governor.

[Seal] Attest: SAM H. NICHOLS,
Secretary of State.

State Record of Deeds, Volume 2, page 292.

Indexed, recorded, Compared.

State of Washington to W. H. Tolliver, Ephrata, Washington.

State of Washington,
County of Douglas,—ss.

I hereby certify that the within instrument was filed for record this 16th day of March, A. D. 1908, at 8:10 o'clock A. M., and recorded at the request of O. A. Kuck, in Book 34, page 638, Records of Deeds of Douglas County, State of Washington, as witness my hand and official seal, this 16th day of March, A. D. 1908.

CHAS. F. WILL,
Auditor of Douglas County, Wash.

Fee 60¢ pd.

[Endorsements]: Service of the within answer by the delivery of a copy thereof hereby admitted this April 4, 1910, at 3 P. M.

(Signed) L. F. CHESTER,
Solicitor for Complainant.

Answer to Amended Bill of Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. April 4th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Notice [of Motion for Hearing].

To the Great Northern Railway Company and to L. F. Chester, Your Attorney:

You and each of you are hereby notified that, on June 20, 1910, at the hour of 10 o'clock A. M., or as soon thereafter as same can be heard by the Court, defendants will bring on for argument the plaintiff's motion for the hearing of the above-entitled cause on the amended bill and answer thereto.

(Signed) C. C. BRYANT and
POINDEXTER & MOORE,
Attorneys for Defendants.

[Endorsements]: Service of the within Notice, by

the delivery of a copy thereof, is hereby admitted this 17th day of June, 1910.

(Signed) L. F. CHESTER,
Attorney for Complainant.

Notice of Hearing Cause on Answer and Amended Bill of Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington. June 17th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Opinion [on the Merits].

L. F. CHESTER and J. J. LAVIN, for Complainant.

C. C. BRYANT and O. C. MOORE, for Defendants.

WHITSON, District Judge.

Questions vital to the merits of this cause were considered on demurrer to the amended bill of complaint and the conclusions reached were expressed in an opinion filed on March 3, 1910, to which reference may be had for a more perfect understanding of the

views now to be stated. Upon the overruling of the demurrer defendants answered and complainant, having set the cause down for hearing upon the bill and answer, it has been argued and submitted upon the issues thus tendered.

Defendants' counsel have not abandoned the position heretofore taken, but still relying upon it, they have brought forward but two additional reasons in opposition to the relief prayed for.

FIRST. That the denials of the answer necessarily preclude the rendering of a decree without the taking of testimony. This having been only presented by general reference, the court is, in a large measure, left to its own devices. Nothing material appears to have been denied unless the traversing of the allegation in relation to the value of the matter in dispute may be so regarded.

In actions at law under similar code provisions to those of this State a denial puts the plaintiff on proof.

Roberts vs. Lewis, 144 U. S. 653.

Green vs. City of Tacoma, 53 Fed. 562.

Jones vs. Rowley, 73 Fed. 286.

In equity the rule is otherwise. A mere denial will be disregarded.

Foster's Federal Practice, sec. 125, p. 306.

The issue must be raised by plea in abatement, and an answer on the merits without interposing such plea to the jurisdiction is a waiver where the bill alleges the jurisdictional amount.

Foster's Fed. Prac. (3rd Ed.), sec. 16, p. 57.

Id., Sec. 125, p. 306.

Pine vs. City of New York, 103 Fed. 337.

Butchers & Grocers Stockyards Co. vs. Louisville, 67 Fed. 35.

SECOND. The other point is made to rest upon two decisions of the Supreme Court of this State. Those are: O'Brien et al. vs. Wilson et al., 97 Pac. 1115, and State vs. City of Seattle, 107 Pac. 827. These cases hold that section 4807 of Ballinger's Code, which provides that the limitations prescribed in the chapter of which the section forms a part, shall apply to actions brought in the name of the State in the same manner as to actions between private parties, does not apply to State school lands the title to which cannot therefore be acquired by adverse user and possession. The conclusion reached was based upon section 11 of the enabling act, in virtue of which Washington was admitted into the Union, and sections 1 and 2, article 16, of the State Constitution, which provide, among other things, that all sales shall be made at public auction at not less than $10.00 per acre. It is contended that since the State could not dispose of the lands in any other way, as held by the Court, that no right or easement could be acquired upon such lands nor an appropriation of water made thereon, the water being part of the land.

The amended bill alleges open and notorious possession for the statutory period, but the overruling of the demurrer was placed upon the ground that the complainant was a prior appropriator of water and had acquired an easement for its use in virtue of the express consent given by section 4334 of Ballinger's Code. That the complainant might become an appropriator for a beneficial use; that the purpose to

which it devoted the water is such a use, and that the statute authorized it to do what has been done, it seems to me can hardly be the subject of dispute. In considering the want of capacity of the State to give consent in any other way than that referred to a brief recapitulation from the former opinion in this case will not be inappropriate.

1. The congressional act of 1866 did not create the right to appropriate water upon the public domain. It existed by virtue of the custom of appropriation which had grown up in the western states and territories.

2. This custom extended to all public lands including sections 16 and 36, which had been set aside for school purposes, for until the admission of the State, these sections continued to be public lands of the United States.

Peterson vs. Baker, 39 Wash. 277.

Barkley vs. United States, 3 Wash. Ty. 522.

3. After the admission of the State, the custom prevailed as before. This is attested by a uniform line of decisions from the highest court of the State.

4. It was expressly recognized by general legislation, and to make the use of water available to railroad corporations we have seen that the right was granted to cross State school lands with aqueducts.

The defendants claim by virtue of a deed from the State, made long after the performance of those acts upon which complainant now relies, and by virtue of which its rights were acquired. That the cases above referred to were intended to extend beyond the particular question decided, I cannot bring myself to be-

lieve. On the contrary, in Peterson vs. Baker, 39 Wash. 275, a road established by user on school lands was expressly upheld. So in State ex rel. Attorney General vs. Superior Court, 36 Wash. 381, while the question was not presented, the Court assumed that a right of way might be acquired over State lands under appropriate legislation. If time permitted many decisions of the Supreme Court of the State could be found which have upheld proceedings looking to the acquisition of easements over State lands in manner other than the way pointed out by the State constitution for sale at public auction. To carry the doctrine to the length contended for would be to nullify legislation which has been universally accepted as competent and which has been generally acted upon, such as the acquisition of rights over state lands by railroads, by telegraph and telephone companies, for commercial waterways, dyking districts, electric light and power purposes, county and city roads, State roads, irrigation ditches, for logging, and the like, as provided in sections 4098, 5608, 5872, 6453, 6831, 6832, 6833, 6836, 6839, 6844, 6845, 6848, 6849, 6850, 6851, 6852, 8172 of Remington & Ballinger's Code, and other sections which might be pointed out, all of which indicate a general public policy not to be lightly overthrown. If the Supreme Court meant to go beyond the mere application of the statute of limitations as against the State on school lands, I should be unable to agree with their reasoning, and since the case is one involving the construction of a Federal statute this Court is at liberty to place its own construction upon the enabling act.

Finding upon the admitted facts that the complainant is entitled to the relief prayed for a decree will go accordingly.

[Endorsements]: Opinion on the Merits. Filed in the U. S. Circuit Court for the Eastern District of Washington. June 29th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

IN EQUITY—No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Final Decree.

This cause came on to be heard at the present term, and on, to wit, the 23d day of June, 1910, and was argued by counsel and thereafter, on the 29th day of June, 1910, upon the consideration thereof, it was ORDERED, ADJUDGED and DECREED. as follows:

This cause coming on to be heard upon the amended bill and answer thereto, and the court finding that said bill is sufficient in form and substance to entitle plaintiff to the relief sought therein, and that the answer thereto fails to put in issue the material allegations in said bill, but admits the same;

It is ORDERED, ADJUDGED and DECREED, that the injunction *pendente lite,* heretofore granted herein against the defendants be, and the same is hereby made perpetual, and that the said defendants, W. H. Tolliver and Sophronia Tolliver, their agents, servants, employees, attorneys and representatives, and each of them, be, and they are hereby forever enjoined and restrained from cutting off the water supply of plaintiff, as the same is now used and enjoyed by plaintiff, from that spring known as Egbert Spring, located upon the northwest quarter of the northeast quarter of Section Sixteen (16), Township twenty-one (21), North Range twenty-six (26), E. W. M., in Grant County, Washington (formerly in Douglas County), described in the bill of complaint herein, and from in any manner interfering with plaintiff's free and uninterrupted use and enjoyment of the water from said spring, through its pipe-line, four (4) inches in diameter, connecting said spring with its water-tank at Ephrata, Washington, or from in any manner diverting the water of said spring from said pipeline.

It is further ORDERED, that the plaintiff, Great Northern Railway Company, do have and recover of and from defendants, W. H. Tolliver and Sophronia Tolliver, its costs and disbursements herein. Defendants except and exceptions allowed.

Done in open court this 9th day of July, 1910.

(Signed) EDWARD WHITSON,
Judge.

O. K. as to form.
(Signed) O. C. M.

[Endorsements]: Final Decree. Filed in the U. S. Circuit Court for the Eastern District of Washington. July 9th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Petition for Appeal.

Defendants, W. H. Tolliver and Sophronia Tolliver, his wife, feeling themselves aggrieved by the final decree made and entered on the bill and answer herein on the 9th day of July, 1910, wherein and whereby it was ordered and decreed that the injunction *pendente lite* theretofore granted against these defendants be and was made perpetual and said defendants, their agents, servants, employees, attorneys and representatives and each of them were forever enjoined and restrained from cutting off the water supply of complainant from that spring known as Egbert Spring, located upon the Northwest Quarter (NW. ¼) of the Northeast Quarter (NE. ¼) of Section Sixteen (16), Township Twenty-one (21) North, Range Twenty-six (26) E. W.

M., in Grant County, Washington, (formerly in Douglas County), described in the amended bill of complaint herein and restraining defendants from in any manner interfering with complainant's free and uninterrupted use and enjoyment of the water from said spring through its pipe-line four (4) inches in diameter, connecting said spring with its water-tank at Ephrata, Washington, or from in any manner diverting the water of said spring from said pipe-line. Also awarding judgment to said complainant against these defendants for its costs and disbursements herein, do hereby appeal from said decree and from each and every part thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith and defendants pray that this appeal may be allowed, and that a transcript of the record, testimony, exhibits, depositions and all proceedings herein upon which said decree was made, duly authenticated by the clerk, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that an appeal bond may be fixed by the Court.

Dated this 14th day of October, 1910.

(Signed) C. C. BRYANT and
POINDEXTER & MOORE,
Solicitors for said Defendants.

[Endorsements]: Petition for Appeal. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 14th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Assignment of Errors.

Come now the defendants in the above-entitled cause and file the following assignment of errors upon which they, and each of them, will rely on their appeal from the decree made and entered by this Honorable Court against them on the 9th day of July, 1910, on the amended bill of complaint and the answer thereto.

The Court erred:

1. In overruling the demurrer to the amended bill of complaint.

2. In rendering and entering a decree in favor of complainant and against these defendants.

3. In issuing a permanent injunction against these defendants restraining them, and each of them, from doing the matters and things referred to in said decree.

4. In not making, rendering and entering a decree in favor of these defendants.

5. In decreeing that the costs be taxed against these defendants in favor of the complainant.

6. In not making and entering a decree in favor of these defendants for their costs.

In order that the foregoing assignment may be and appear of record, defendants present the same to the Court and pray that the Court may consider all the pleadings, records, files, affidavits and exhibits adduced herein on which said decree appealed from was made, and that such disposition may be made as in accordance with the laws and Statutes of the United States in such cases made and provided, and defendants pray a reversal of said order and decree as made and entered by the Court.

(Signed) C. C. BRYANT and
O. C. MOORE,
Solicitors for Defendants.

[Endorsements]: Assignment of Errors. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 14th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Order [Allowing Appeal, etc.].

On reading and filing defendants' petition for an appeal, it is hereby ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree heretofore rendered, filed and entered herein on the 9th day of July, 1910, in favor of complainant and against defendants on the amended bill of complaint and answer thereto; and

It is further ORDERED that a certified transcript of the record, testimony, exhibits, affidavits and all proceedings herein upon which said order and decree was made be forthwith transcribed to the said Circuit Court of Appeals.

It is further ORDERED that the bond on appeal be fixed at the sum of $200.00.

Dated at Spokane, Washington, this 14th day of October, A. D. 1910.

(Signed) CHAS. E. WOLVERTON,

Judge.

[Endorsements]: Order Allowing Appeal. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 14th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Bond on Appeal.

Know All Men by These Presents, That we, W. H. Tolliver and Sophronia Tolliver, his wife, defendants above named as principals, and M. E. Drake and Lee Tolliver, as sureties, are held and firmly bound unto the above-named Great Northern Railway Company, a corporation, complainant above named, in the penal sum of Two Hundred ($200.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, successors, executors and administrators jointly, severally firmly by these presents.

Signed, sealed and executed this 14th day of October, A. D. 1910.

The conditions of the above obligation are such

that whereas, on the 9th day of July, A. D. 1910, an order and decree was made and entered by the Court in the above-entitled cause in favor of the complainant and against these defendants permanently restraining them from cutting off the water supply of complainant from that certain spring known as "Egbert Spring," located upon the Northwest Quarter (NW. ¼) of the Northeast Quarter (NE. ¼) of Section Sixteen (16), Township Twenty-one (21) North, Range twenty-six (26), E. W. M., in Grant County (Formerly Douglas County), Washington, together with certain other relief, including complainant's costs and disbursements in said cause expended, and

Whereas, the above-named W. H. Tolliver and Sophronia Tolliver, his wife, have appealed and are appealing from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and for this purpose have been required by order of this Court to give an appeal bond in the sum of Two Hundred ($200.00) Dollars,

Now, therefore, if the above bounden principals, W. H. Tolliver and Sophronia Tolliver, his wife, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, or fail to sustain their appeal, then this obligation shall be void, otherwise to remain in full force and effect.

(Signed) W. H. TOLLIVER. [Seal]
(Signed) SOPHRONIA TOLLIVER. [Seal]
By W. H. TOLLIVER,
Her Atty. in Fact.
(Signed) M. E. DRAKE. [Seal]
(Signed) LEE TOLLIVER. [Seal]

State of Washington,
County of Grant,—ss.

M. E. Drake and Lee Tolliver, being first duly sworn, each for himself and *not for* the other, deposes and says: That he executed the foregoing and attached bond as a surety; that he is a citizen and resident of Grant County, Washington, and is not a counsel or attorney at law, sheriff, Clerk of the Superior Court, or other officer of such court; that he is worth the sum of Five Hundred ($500.00) Dollars in property within this State over and above all debts and liabilities and exclusive of property exempt from execution.

(Signed) M. E. DRAKE.
(Signed) LEE TOLLIVER.

Subscribed and sworn to before me this 14th day of October, A. D. 1910.

[Notarial Seal] (Signed) O. A. KUCK,
Notary Public in and for the State of Washington,
Residing at Ephrata, Washington.

Examined and approved this October 14th, 1910.

(Signed) CHAS. E. WOLVERTON,
Judge.

[Endorsements]: Bond on Appeal. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 14th, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. ——.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Citation [Original].

The President of the United States to the Great Northern Railway Company, a Corporation, Complainant Above Named:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, wherein W. H. Tolliver and Sophronia Tolliver, his wife, are appellants and the Great Northern Railway Company, a corporation, is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable JNO. M. HARLAN, Sr.

Associate Justice of the Supreme Court of the United States of America, this 14th day of October, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

CHAS. E. WOLVERTON,
United States District Judge.

[Seal] Attest: FRANK C. NASH,
Clerk of said Court.

Service of the foregoing citation, by the delivery of a copy thereof, hereby admitted this 14 day of October, A. D. 1910.

L. F. CHESTER,
Solicitors for Respondent.

[Endorsed]: No. ——. In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division. Great Northern Railway Company, Complainant, vs. Tolliver et ux., Defendants. Citation. Filed in the U. S. Circuit Court, Eastern District of Washington. Oct. 14, 1910. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

Praecipe for Transcript of Record on Appeal.

To the Clerk of the Above-entitled Court:

You will please make a transcript of the record for use on appeal in the above-entitled cause as follows:

1. Amended Bill of Complaint.
2. Stipulation that demurrer to original bill of complaint shall be considered as demurrer to amended bill of complaint.
3. Demurrer to amended bill of complaint.
4. Opinion of Court on demurrer to amended bill of complaint.
5. Order overruling demurrer to amended bill of complaint.
6. Answer to amended bill of complaint.
7. Notice of hearing of cause on the amended bill of complaint and answer thereto.
8. Opinion of the Court on the merits.
9. Final decree.
10. Petition for appeal and order allowing the same.
11. Assignment of Errors.
12. Appeal bond and original citation issued and filed in said cause.

(Signed) C. C. BRYANT, and
O. C. MOORE,
Solicitors for Defendants.

[Endorsements]: Praecipe for Transcript of Record on Appeal. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 14th, 1910. Frank C. Nash, Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1419.

GREAT NORTHERN RAILWAY COMPANY (a Corporation),

Complainant,

vs.

W. H. TOLLIVER and SOPHRONIA TOLLIVER, His Wife,

Defendants.

United States of America,
Eastern District of Washington,—ss.

I, Frank C. Nash, Clerk of the Circuit Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing pages, numbered from one (1) to fifty-eight (58), inclusive, constitute and are complete, true and correct copies of the amended bill of complaint, stipulation that demurrer to original bill of complaint shall stand as a demurrer to the amended bill of complaint, demurrer to amended bill of complaint, order overruling demurrer to amended bill of complaint, answer to amended bill of complaint, notice of hearing cause on the amended bill of complaint and answer thereto, opinions of Court, final decree, petition for appeal and order allowing same, assignment of errors and bond on appeal, as the same remain on file and of record in said Circuit Court, and that the same which I

transmit constitute my return to the order of appeal, lodged and filed in my office on the 14th day of October, A. D. 1910.

And I hereby annex and transmit the original citation in said suit.

I further certify that the cost of preparing and certifying said record amounts to the sum of $40.30, and that the same has been paid in full by O. C. Moore, Esquire, of counsel and solicitor for the appellants, W. H. Tolliver and Sophronia Tolliver, his wife.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at the city of Spokane, in said Eastern District of Washington, in the Ninth Circuit, this 7th day of November, 1910, and the Independence of the United States of America the One Hundred and Thirty-fifth.

[Seal] FRANK C. NASH,
Clerk U. S. Circuit Court for the Eastern District of Washington.

[Endorsed]: No. 1914. United States Circuit Court of Appeals for the Ninth Circuit. W. H. Tolliver and Sophronia Tolliver, His Wife, Appellants, vs. The Great Northern Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Eastern District of Washington, Eastern Division.

Filed November 14, 1910.

F. D. MONCKTON,
Clerk.

No. 1914.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. TOLLIVER and SOPHRONIA TOLLIVER, his wife,

Appellants,

vs.

THE GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellee.

POINDEXTER & MOORE,

and

C. C. BRYANT,

Solicitors for Appellants.

O. C. MOORE, *of Counsel.*

APPELLANTS' BRIEF.

Filed this ..... day of February, 1911.

F. D. MONCKTON, Clerk,

By ..... Deputy Clerk.

COLE PRINTING COMPANY

No. 1914.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. TOLLIVER and SOPHRONIA TOLLIVER, his wife,
Appellants,
vs.
THE GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellee.

POINDEXTER & MOORE,
and
C. C. BRYANT,
Solicitors for Appellants.
O. C. MOORE, *of Counsel.*

APPELLANTS' BRIEF.

STATEMENT OF CASE.

This suit was brought to restrain appellants from interfering with the diversion by appellee of the waters of a spring hereafter more fully described.

The order and decree appealed from was entered on the amended bill and answer thereto without the intro-

duction of any evidence, hence only the admitted facts are material on this review, which, briefly state, are substantially as follows:

Appellee is a common carrier owning and operating a line of railroad through the State of Washington. It maintains at Ephrata Station in said state a water tank from which its trains and engines are furnished water. This tank is supplied by gravity flow through a pipe line from what is known as "Egbert Spring," which spring is situate on the Northwest quarter (N. W.¼) of the Northeast quarter (N. E. ¼) of Section Sixteen (16), Township Twenty-one (21) North, Range Twenty-six (26) E. W. M., Grant County, Washington. These premises were, at all the times mentioned in said amended bill prior to the 25th day of February, 1908, state school lands held under Sections 10 and 11 of the enabling act by which Washington was admitted to the Union, and Sections 1 and 2, Art. 16 of the State Constitution adopted by the state in pursuance of said enabling act. Said pipe line was constructed and the waters of said spring by that means diverted in August, 1892, by appellee's predecessor in interest, the St. Paul, Minneapolis & Manitoba Ry. Co., and said pipe line has been constantly used by the railroad company since that date. On October 27, 1905, one Jesse Cyrus entered into an executory contract with the State of Washington for the purchase of said described land, subject to the conditions and restrictions imposed by the enabling act and the laws of Washington on the sale of state school lands. On or about February 20, 1908, the said Jesse Cyrus transferred to appellee, W. H. Tolliver, the said contract

of purchase, and thereafter on February 25, 1908, the State of Washington, pursuant to the terms and conditions thereof, deeded said land to the said W. H. Tolliver, a copy of which deed is attached as "Exhibit A" to the answer of appellants to the amended bill.

A demurrer to the amended bill having been overruled by the court (Tr., pp. 15, 18, 27) appellants interposed an answer denying all the allegations of the amended bill except as above stated (Tr., p. 28), whereupon the cause was set down by appellee for hearing on the bill and answer, and after argument the court rendered an opinion directing a decree in accordance with the amended bill (Tr., p. 41) and a decree perpetually enjoining appellants from interfering with said pipe line and the use of the waters of said spring by appellee was accordingly entered (Tr., p. 46). From said decree appeal was taken to this court.

ASSIGNMENT OF ERRORS.

Appellants specify and assign the following errors committed by the lower court:

The court erred:

1. In overruling the demurrer to the amended bill of complaint.

2. In rendering and entering a decree in favor of complainant and against these defendants.

3. In issuing a permanent injunction against these defendants restraining them, and each of them, from doing the matters and things referred to in said decree.

4. In not making, rendering and entering a decree in favor of these defendants.

5. In decreeing that the costs be taxed against these defendants in favor of the complainant.

6. In not making and entering a decree in favor of these defendants for their costs.

ARGUMENT.

The vital question presented on this appeal, in our view of the case, is whether the facts admitted by the answer are sufficient to justify the decree entered thereon. This proposition may be resolved into two sub-heads, and, for convenience, will be treated without respect to the several specifications of error.

I.

Bearing in mind that the land on which the spring in question is located was school land held by the State of Washington as such at all times prior to February 25, 1908 (Par. 11 of Answer; Tr., p. 34), it becomes necessary to consider the provisions of the Federal Statutes and the enabling act, by the terms of which the land was ceded to the state on the admission of Washington into the Union.

Section 20 of the Act of March 2, 1853, entitled "An act to establish the Territorial Government of Washington Territory;" U. S. Revised Statutes, Sec. 1947, contains the following provision:

"Sections sixteen and thirty-six in each township

in said territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said territory."

Sections 10 and 11 of said enabling act are as follows:

"Sec. 10. That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act, until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

Sec. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed but shall be reserved for school purposes only."

Sections 1 and 2, Art. 16 of the Constitution of Washington, adopted pursuant to the restrictions of said enabling act, are as follows:

> "Sec. 1. All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.
>
> Sec. 2. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded: Provided, That the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature."

The land on which said spring is located, being school land granted to the State of Washington under an express trust with power to dispose of same only in the manner specified by the Congress in the State Constitution, to the end that the proceeds of such sale might become an endowment fund for the benefit of the public

schools of the state, it is not possible for the state to allow title to be acquired in any other manner than that specified by law. Respondent claims the right to maintain its pipe line over and across said land and the right to continue the appropriation of the waters flowing from said spring. Hence, respondent claims a valuable interest in and to the land itself.

While essentially a Federal question, the Supreme Court of Washington has had occasion to pass on this question a number of times since the state was admitted into the Union.

In the case of Wheeler vs. Smith, 5 Wash. 704, 32 Pac. 785, 786, the Supreme Court of Washington had occasion to hold that a mineral location could not be made on school lands, as will distinctly appear from the following excerpt from the opinion in that case:

> "There is still another ground for objection to a part of these entries even under the timber and stone act, *viz.*, one of the sections upon which this stone is found is section 36, and it appears that at all times when these parties were attempting to locate their claims the lands were surveyed. The Act of March 2, 1853, entitled 'An act to establish the territorial government of Washington Territory,' provided as follows: 'Sec. 20. And be it further enacted, that when the lands in said territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said territory.' This section had been followed up by Section 10 of the enabling act, approved February 22, 1889,

> before the plaintiffs' placer locations were made, making a present grant of sections 16 and 36 to the state, to take effect as soon as the state was organized."

In the case of O'Brien vs. Wilson, 51 Wash. 52, 97 Pac. 1115, it was held that title to school lands could not be acquired by adverse possession. After quoting the provisions of the enabling act and the State Constitution bearing on the proposition, together with the provisions of the State Statutes respecting adverse possession, the court said:

> "If Section 4807 should be construed to give title to school lands by adverse possession, in our opinion, it is repugnant to the act of Congress and the sections of the Constitution above quoted."

Again, in the case of State v. City of Seattle, 57 Wash. 602, 107 Pac. 827, it was held that a city street could not be established by prescription across land ceded to the state for educational purposes and the court there took occasion to review and affirm its previous decision in the case of O'Brien vs. Wilson, and again considered the authorities discussed in the former decision.

In the case of Northern Pacific Railroad Company vs. Townsend, 190 U. S. 267, 47 Law Ed. 1044, it was held that adverse user could not confer title to a portion of the right of way granted to the railroad company by act of Congress of July 2, 1864, and this decision has been followed and affirmed in numerous other cases, including N. P. Ry. Co. v. Ely, 197 U. S. 1, 49 Law Ed. 639.

The questions discussed by the Supreme Court of Washington in the cases of O'Brien vs. Wilson and State vs. City of Seattle, *supra,* were fully discussed by the Supreme Court of Minnesota in the case of Murtugh vs. C., M. & St. P. Ry. Co., 112 N. W. 860, and the reasoning in that case, was largely adopted by the Washington Supreme Court in the former cases, the following excerpt being quoted therefrom:

> "The state accepted the trust, and by its Constitution solemnly covenanted with the United States to apply the granted lands to the sole use of its schools according to the purpose of the grant, and prohibited the sale of any portion of the granted land except at public sale. Such being the nature of the title of the state to its school lands, it is unthinkable that the Legislature intended, by Section 12, c. 66, Gen. St. 1866, and later acts amending it, to provide a way whereby the trust as to any of the school lands might be defeated, and title thereto acquired by adverse possession, contrary to the mandate of the Constitution that title thereto could only be obtained by a public sale thereof.
>
> The decision in the case of Northern Pacific Railway Co. v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044, is an interesting and authoritative one. In that case the railway company brought ejectment to recover from the defendant a portion of its right of way, to which the defendant claimed title by adverse possession under the statute of limitations of this state. 84 Minn. 152, 86 N. W. 1007, 87 Am. St. Rep. 342. The Supreme Court of the United States held that, although the plaintiff's right of way, granted to it by the United States, was amenable to the police power of the state, yet an individual could not acquire title to any portion thereof by adverse possession under the statute of limitations of the state. In its opinion the court, after stating that the grant of the right of way was for a specific purpose, said: 'This being the nature

of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly.'

We are, then, of the opinion that, if the statute under consideration must be construed as authorizing the acquisition of title to the school lands of the state by adverse possession, it violates in this respect, not only the terms of the grant, but also the Constitution of the state. We are, however, of the opinion that the statute fairly may be given a construction which is consistent with the terms of the school land grant and the provisions of the State Constitution applicable thereto. If the statute be read in connection with the general and well-understood rule of law that title to public land cannot be acquired by adverse possession, the history of our school land grant, the nature of the title of the state to its school lands, and the mandates of our Constitution with reference to them, it is clear upon the face of the statute that the Legislature did not intend to provide for the acquisition of the title to school lands by adverse possession. We accordingly hold that title to lands granted to the state of Minnesota for the use of its schools by the United States can not be acquired by adverse possession, as against the state.''

The reasoning of the above authorities is directly applicable, we submit, to the question presented by the case at bar and requires that the decree of the lower court be reversed.

II.

Regardless of whether or not the Congressional enactments and Constitutional provisions controlling the dis-

position of school lands in the State of Washington prohibit the acquisition of an interest in such lands by appropriation or prescription, appellants contend that, considering the question as purely a matter for state control, the Statutes of Washington forbid the appropriation of waters for the purpose to which respondent has appropriated the waters of the spring here involved. Section 4091 of Ballinger's Code, specifying the purposes for which the water of a flowing spring may be appropriated, is as follows:

> "The right to the use of water in any lake, pond, or flowing spring in this state, or the right to the use of water flowing in any river, stream, or ravine of this state, FOR IRRIGATION, MINING OR MANUFACTURING PURPOSES, OR FOR SUPPLYING CITIES, TOWNS, OR VILLAGES WITH WATER, OR FOR WATERWORKS, may be acquired by APPROPRIATION, and as between appropriations, the first in time is the first in right." (Italics ours.)

It will be seen that by specific Legislative enactment the right to appropriation is limited to, (1) irrigation, (2) mining, (3) manufacturing, (4) municipal purposes, and it will not be contended that the supplying of railway locomotives and trains with water comes within any of the above designated purposes. The appropriation of private property to a private use is recognized and permitted in certain instances, though in derogation of all established principles of law surrounding and protecting the individual assertion of property rights and, hence, being in violation of the right of the individual to enjoy that over which the law has permitted him to acquire private dominion, the claim of ownership by

appropriation, under whatever circumstances asserted, will be viewed with the closest scrutiny. In this instance the people of the State of Washington have, by solemn Legislative enactment, provided for the appropriation of water in certain specifically designated cases, which do not include the purposes for which respondent has sought to appropriate the water flowing from Egbert Spring. This Statute, being in derogation of the rights of private ownership and of common right, must be strictly construed, and calls for the application of the well known principle of statutory construction expressed by the phrase, "*Expressio unius est exclusio alterius.*

Arthur v. Cumming, 91 U. S. 362, 23 L. Ed. 438.
Pettit v. Duke, 37 Pac. 568, 10 Utah 311.
U. S. v. Arredondo, 6 Peters 725.

In view of the foregoing, appellants confidently urge that the decree of the lower court should be reversed.

Respectfully submitted,

POINDEXTER & MOORE,
and
C. C. BRYANT,
Solicitors for Appellants.

O. C. MOORE, *of Counsel.*

United States Circuit Court of Appeals for the Ninth Circuit

W. H TOLLIVER and SOPHRONIA TOLLIVER, His Wife,
Appellants,

vs.

THE GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Appellee.

No. 1914.

Brief of Appellee

L. F. CHESTER,
WILLIAM A. MONTEN,
Solicitors for Appellee.

United States Circuit Court of Appeals for the Ninth Circuit

W. H TOLLIVER and SOPHRONIA TOLLIVER, His Wife, *Appellants,* vs. THE GREAT NORTHERN RAILWAY COMPANY, a Corporation, *Appellee.*	No. 1914.

Brief of Appellee

Appellee objects to the statement of the admitted facts made in the brief of appellants, as being insufficient, and submits in lieu thereof the following statement:

In 1892 the land described in the pleadings was public school land, belonging to the State of Washington, acquired by it from the Federal Government in the manner stated by appellants, and was situated in Douglas County, Washington, and is now in Grant County, the latter county having been created about two years ago. In 1892 appellee's predecessor and

vendor, the St. Paul, Minneapolis & Manitoba Railway Company, built its road through said county and in close proximity to this land, and ever since the construction thereof said road has been in continuous operation, doing the general business of a common carrier, operating freight and passenger trains thereover, its said line extending through several states. When the road was constructed in 1892, the company constructing it also constructed a pipe line, three inches in diameter, from a spring on this land to its water tank, located on its right of way at Ephrata, a station near by, and supplied the same with water by means of a gravity flow from said spring, for use of its engines and cars. At that time it paid to one, J. F. Beazley, the sum of twenty-five hundred dollars, and took from him a conveyance for an easement across the land for said pipe line, and the perpetual right to take the water from said spring to supply its tank.

In 1899 appellee paid to Jesse Cyrus five hundred dollars, and took from him a conveyance confirming all the rights previously granted by the Beazley conveyance, and granting the right to increase the size of said pipe line to four inches in diameter, which was done, with perpetual right to take the water from the spring through said pipe line. This instrument

is an absolute conveyance, with usual covenants of warranty, and constitutes a part of the pleadings in this case. Both these instruments were promptly recorded in the county where the land was situated, and the railroad has been in the constant, open, notorious, peaceable and uninterrupted use and enjoyment of said pipe line, and water supply until the interference thereof by appellants, hereinafter stated. Only a small portion of this spring is appropriated by this pipe line.

So far as appears from this record, neither Beazley nor Cyrus had acquired any right to, or interest in, the land described, nor had anyone prior to the railroad, made or sought to make any appropriation of the water from this spring for any purpose. Some time subsequent to Cyrus' conveyance to the railroad, he entered into a contract with the State of Washington, for the purchase of this land, and while this contract was in force, he, with permission from the state, assigned said contract to appellant, W. H. Tolliver, who five days later, February 25th, 1908, acquired from the state the usual conveyance in sales made by the government. This conveyance constitutes a part of appellants' pleading in this case. The Tollivers were living in the same county and locality

where the land, spring and pipe lines were. On October 26th, 1909, Tolliver instituted a suit in the Superior Court of Grant County, Washington, against appellee, to eject it from this land, to permanently enjoin it from taking water from this spring, and for damages. After that case was ordered removed to the Federal Court, and before the record was filed therein, Tollivers, appellants, forcibly disconnected this pipe line, forbade the further use of it, and left appellee without any water for said tank, and if not restrained would have continued in this course. Appellee had and has a large number of freight and passenger trains, carrying United States mail, live stock and other perishable articles, which are daily supplied with water from this tank, and which supply was and is necessary for its railway purposes. Thereupon appellee instituted this suit in the Circuit Court of the United States for the Eastern District of Washington, for the purpose of enjoining and restraining appellants from interfering with its use and enjoyment of this pipe line, and by means thereof taking the water from said spring for its railroad purposes. After the overruling of appellants' demurrer to the amended bill, and upon said amended bill and the answer thereto, a final decree

was entered, enjoining and restraining appellants from in any manner interfering with appellee's continuous use of said pipe line and appropriation of said water. The value of the property and the amount in controversy are greatly in excess of two thousand dollars.

Appellee relies upon its right to the continuous use of the water from this spring; first, on account of its original appropriation thereof, independently of any transaction with Beazley and Cyrus; second, on account of the conveyance made to it by Cyrus, with the covenants of warranty therein, his contract of purchase from the state, and the final acquisition of a deed from the state by Tolliver, under the assignment of said contract to him by Cyrus; and third, by its irrevocable license growing out of same.

Counsel for appellants seem to lay stress upon the question of limitation. From the two opinions filed by the trial court, and which are in the record, it will be seen that this question did not enter into the case. It was the opinion of the trial court that by the original appropriation of this water, appellee has acquired the superior right thereto. If that conclusion is correct, then, of course, the judgment should be affirmed, without the necessity of inquiring further.

In support of the

PROPOSITION

that under the admitted facts appellee acquired the superior right to appropriate this water, we submit for the consideration of this court, the following

AUTHORITIES:

Atchison v. Peterson, 20 Wallace, 509.
Basey v. Gallagher, 20 Wallace, 670.
Jennison, Exr., v. Kirk, 98 U. S., 456.
Broder v. Water Co., 101 U. S., 274.
Barkley v. United States, 3 Wash. Ty., 522.
Thorp v. Tenem Ditch Co., 1 Wash. St., 566.
Benton v. Johncox, 17 Wash., 277.
Offield v. Ish, 21 Wash., 277.
Longmire v. Smith, 26 Wash., 439.
Peterson v. Baker, 39 Wash., 277.
Murray v. Tingley, 50 Pac., 723.
Wells v. Mantes, 34 Pac., 423.
Cruse v. McCauley, 96 Fed., 370.
De Necochea v. Curtis, 20 Pac., 563; reaffirmed 22 Pac., 198.
Burrows v. Burrows, 23 Pac., 146.
Watterson v. Sauldunhehere, 35 Pac., 432.
Northport Brewing Co. v. Parrot, 22 Wash., 243.
Twohey v. Campbell, 60 Pac., 396.
Lux v. Hagen, 10 Pac., 674.
Nevada Ditch Co. v. Bennett, 45 Pac., 472.
Long on Irrigation, Secs. 25, 39 and 47.
Weil on Water Rights, Secs. 75, 76, 106, 108, 109, 177.
17 Am. & Eng. Ency. Law, 2nd Ed., p. 498.
Ballinger's Code, Wash., Sec. 4092.
Ballinger's Code, Wash., Sec. 4334. (Rem. & Bal., Sec. 8740.)
Mason v. Yearwood, 58 Wash., 276.

In the case of Atchison vs. Peterson, 20 Wallace, 509; 22 L. Ed. 414, cited supra, the court, after discussing the common law rule as to riparian rights in a stream, goes on to say:

"This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

And again, further in the opinion, the court expressly asserts that this right of prior appropriation which already existed at that time, was confirmed by the Act of Congress 1866, as follows:

"This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866. The Act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its 9th section declares 'That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.' 14 Stat. at L., 253."

This view is further extended to appropriation for any beneficial use, and especially irrigation in Basey v. Gallagher, 20 Wallace, 670; 22 L. Ed. (U. S.), 452, 454. In the course of its opinion, the court says, referring to the case of Atchison v. Peterson, and a discussion of the rights of miners:

"The views there expressed and the rulings made are equally applicable to the use of water on the public lands for the purposes of irrigation. No distinction is made in those states and territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

The court further says on the same page:

"Ever since that decision it has been held generally throughout the Pacific States and Territories, that the right to water by prior appropriation for any beneficial purpose, is entitled to protection. Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first

appropriator, exercised within reasonable limits, is respected and in force."

The court further says at page 455 (Law Ed.):

"It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or by the decisions of the courts."

In the case of Barkley v. United States, 3 Wash. Ty., 522, it is decided that by the organic act of Washington Territory, reserving sections 16 and 36 of each township for the common schools of the Territory, such sections are not severed from the public domain, nor is their character as public lands thereby destroyed, but that the United States may maintain an action under the Act of Congress, approved February 25, 1885 (23 U. S. Stats., 321), prohibiting the enclosure of public lands of the United States, without claim or color of title against anyone enclosing such sections.

In the case of Thorpe v. Tenem Ditch Co., 1 Wash., 566, the court, after first holding at page 569 that the prior appropriator of the flow of any water over the public lands of the United States has, by a local custom which is recognized by the United States, a vested right therein, which cannot be defeated by

one who, having consented to such appropriation, subsequently filed a homestead entry and obtained a patent to the land, then takes up the question whether a statute of the Territory of Washington of 1873 (Session Laws 1873, p. 520), which gives a right of appropriation to land owners, is limited to land owners, and says at page 570:

"It has been claimed that the statutes of the Territory of Washington of 1873 do not extend the right to appropriate water to any except land owners. If this were true, such act of the territorial assembly could not restrict the right of prior appropriation as it existed by the local laws and customs and the decisions of the courts, and certainly the legislature did not intend to limit or destroy those rights. The local laws and customs extended the right not only to proprietors of mines and land, but to any others who, for the purpose of any sort of business or trade, or even the sale of water, actually made the appropriation."

This expression indicates that the court treated this statute of 1873 as partially declaratory of, but not limiting the customary law as to prior appropriation. It also recognizes, in express words, the right to appropriate the water for any beneficial use.

In the case of Benton v. Johncox, 17 Wash., 277, in which case the late lamented judge who made the decree in the present case appeared as counsel, the soundness of the case of Atchison v. Peterson, 20 Wall., 509, is expressly concurred in. Referring to

the rights of a subsequent appropriator, as against a patentee of the government, the court at page 288 says:

"While the court fully recognized the doctrine of prior appropriation of water on the public lands, in accordance with the local customs, laws and decisions of courts, it announced and established the just and equitable rule that the riparian rights of a patentee of the government attach, by relation, at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land."

And again, at page 289, the court says:

"Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public and become private property, it is no longer applicable."

The court in this case, therefore, expressly recognizes the law as to prior appropriation for the State of Washington. This also appears from the case of Offield v. Ish, 21 Wash., 277, cited supra, in which the court at page 281 says:

"The custom of the acquisition of the right to water for use in irrigation existed here upon public lands of the United States at the time the respondent settled upon his premises," referring to the year 1872.

In Longmire v. Smith, 26 Wash., 439, cited supra, the court says at page 447:

"The right to appropriate water from the water courses on the public domain was founded upon the necessity and customs of settlers in the arid regions,

and was authorized by the federal government, the owner of both the land and the water. It is an elementary principle of the law of appropriation of water for irrigation that the first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants by appropriation or riparian ownership."

That in respect to the right of appropriation, no exception existed in the case of sections 16 and 36, reserved for school purposes, would by analogy appear from the case of Peterson v. Baker, 39 Wash., 275, cited supra. In that case it was held that United States Rev. Stats. (U. S.), section 2477, which provides that, "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted;" was applicable to school sections 16 and 36, for the reason that the reservation of such sections for school purposes was not a reservation of them for public use, so as to except them from the operations of said section as to highways.

From the case of Northport Brewing Co. v. Perrott, 22 Wash., 243, it appears that in an action by one entitled under Ch. 1, Title 20, 1 Hill's Code, to appropriate water in a flowing stream for manufacturing purposes, to restrain defendant from interfering with the free and unobstructed flow of the water so appropriated, an affirmative defense is demur-

rable, which sets up that defendant claims the ownership and use of such water by reason of a homestead entry made prior to the appropriation, but which fails to allege that defendant is making any beneficial use of the water diverted by him from the stream.

See also Mason v. Yearwood, 58 Wash., 276, the latest Washington case on this subject.

Ballinger & Remington's Code, Sec. 6316 (Bal. Code, 4091; L. '91, 327, Sec. 1), reads as follows:

"Right to Use by Appropriation. The right to the use of water in any lake, pond, or flowing stream in this state, or the right to the use of water flowing in any river, stream, or ravine of this state, for irrigation, mining or manufacturing purposes, or for supplying cities, towns or villages with water or for water works, may be acquired by appropriation, and as between appropriation, the first in time is the first in right."

In this connection reference is made to the annotations under this section, in Ballinger & Remington's Code, which indicate clearly that this section, passed in 1891, three years after the admission of the State of Washington, was merely declaratory of the recognized law as to waters, prior to the passage of this section. It is apparent that this section is not intended as a restriction on the previous rights as to appropriation. Counsel for appellants entirely misconstrue the intent of this section, in asserting that it was restrictive of common law right, and therefore

should be construed most strictly. On the contrary, since it is simply declaratory of the law, as it then existed, it must be construed liberally.

Remington & Ballinger's Code, Sec. 6317 (Bal. Code, 4092), indicates that even under the statute, appropriation may be made by "any person, persons, corporation or association." This same section 6317, which it is not thought necessary to quote in detail, indicates how appropriation is to be made, namely, by posting a notice in writing, etc. Under the statute, no other method of appropriation is pointed out, but that this statutory method is not exclusive, appears most clearly from the repeated decisions of the Washington Supreme Court (see annotations to the said section), in which appropriation actually made for beneficial uses are protected as against subsequent appropriations, even though no posting of notices took place.

In Remington & Ballinger's Code, Sec. 8740 (Bal. Code, 4334), it appears that a railroad corporation may appropriate, by appropriate condemnation proceedings, land for its uses, and "in case of a railway, to appropriate a sufficient quantity of any such land, including lands granted to the state for university, school and other purposes, and also tide and shore lands belonging to the state (but not including harbor

areas), in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct, etc."

This section indicates that it was never the intention of the legislature that school lands should lie unused, subject to no rights whatsoever, until they passed from the State of Washington into private hands.

It is submitted that the appropriation of this spring water by the railroads may well come under the express term of the statute, allowing appropriation for water works. This is well pointed out in the opinion of the learned judge who granted the decree. But, in view of the fact that this statute is merely declaratory, and not restrictive of the customary water law, prior to the enactment thereof, and in view of the fact that the old customs permitted appropriation for beneficial use, it would seem clear that this appropriation on the part of the railroad was proper, if the said use was beneficial. That the said use was beneficial, it is thought too clear for any controversy.

As merely indicative of the broad view that the courts are now taking of "beneficial use," reference is made to the very recent federal case of Cascade Town Co. v. Empire Water & Power Co. et al., de-

cided Oct. 3rd, 1910, in the Circuit Court for the District of Colorado, reported in 181 Fed. at 1011, in which it was held that the building of a summer resort and the beautifying thereof with plants, flowers, shrubbery and trees, and the making of beautiful scenery by means of the mist, spray and water from a small water fall, was an appropriation to beneficial uses. In this case the right of a subsequent appropriator to divert water for the purpose of furnishing power to an electric plant, was expressly disallowed.

Turning now to the question presented by appellants' first argument, appellee first submits that it has no quarrel with the law stated in the cases cited, but does most earnestly submit that these cases have no application or point in this argument whatsoever. It is to be remembered that the litigants in this case are Tolliver and wife and the Railroad Company, and that the State of Washington is in no wise, in any degree whatsoever, interested therein; nor has it ever at any time been interested therein. It is conceded that under the decisions of the State of Washington, the doctrine of adverse user cannot be applied, as against the state. That question is, however, not involved in this case.

The case of Wheeler v. Smith, 5 Wash., 704, cited at page 7 of appellants' brief, turns squarely on the

point whether the land in question could be located on as a mineral claim. The court found that there was no mineral; that the land was chiefly valuable for stone, and that for such reason this land was not subject to location under the Acts of Congress, either as a lode or placer mining claim. Nothing further was necessary for the decision of the case, and no other argument was made with respect to the case by counsel for either side. It is true that at page 711, the court of its own volition, without any necessity for so doing, adduces a further ground for holding that the land was not subject to location, and it is this third ground that appellants point out. As a third ground the court does hold that sections 16 and 36 in each township are reserved for school purposes. The court, however, points out that this ground was not suggested by counsel for either side, and the court neither argues out any reason for this third ground, nor makes any specific application thereof. Especially does it make no application with respect to appropriation of water. The case is, therefore, of no authority here.

The case of O'Brien v. Wilson, 51 Wash., 52, cited at page 8 of appellants' brief, holds simply that title to school lands could not be acquired by adverse pos-

session as against the state, and that a person who purported to hold possession adversely to the state, thereby acquired no rights, as against one who subsequently and properly was given title by the state. No objection can be made to this decision; but that case is not in point in the present case.

The next case of State v. City of Seattle, 57 Wash., 602, cited at page 8 of appellants' brief, is likewise a case in which it was held that the City of Seattle could acquire no rights, as against the state itself, by adverse possession. This case, of course, has no application here.

In the next case of Northern Pacific Ry. v. Townsend, 190 U. S., 267, it was held that title could not be had by adverse possession against the Railroad Company, for the reason, as pointed out in the opinion of the court, that this land was given to the Railroad Company by the United States, for the express purpose of being used by the railroad, and that the railroad acquired, as it were, but a limited fee in the property, with nececesary reversion to the United States, if it should cease to be so used.

The court says:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to

be for a designated purpose,—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. * * * In effect, the grant was of a limited fee made on implied condition of reverter, in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficiency to a statute of limitations of a state, as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection, which could not be done directly. * * * Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the Act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

In this connection it is pertinent to point out that the right of way is granted to the railroad for public uses as a carrier, and that it was never contemplated that the railroad should ever part with its possession. On the other hand, school lands were granted to the State of Washington by the United States, with the express intention in view, that the State of Washington should part with its title to said lands, to private settlers, upon compliance with certain terms thereof. That this view is correct will be seen from

the case of N. P. Ry. Co. v. The City of Spokane, 45 Wash., 229, in which it is held that where lands may be parted with by the railroad company, even from a portion of its right of way, that title may be had against the Railroad Company by adverse possession.

Appellee now turns to the second main portion of its argument and presents the

PROPOSITION

that appellee's right to the decree granted may well be sustained by the doctrine of after acquired title.

The court's attention is directed to the fact that at the time appellants' predecessor in title, Cyrus, confirmed the Beazley conveyance to the railroad, and for a consideration of five hundred dollars, by warranty deed granted the railroad the right to enlarge the pipe line from three inches to four inches, inside diamter, that Cyrus was then in possession. The date of the warranty deed from Cyrus to the Railroad was 1899. This deed was at once put on record in the office of the County Auditor. The railroad then enlarged its pipe to the permitted dimension. Subsequently, the same Cyrus, in 1905, entered into a contract with the State of Washington, for the purchase of the said land. Sections 6672, 6674, 6675, 6676 and 6692 of Ballinger & Remington's

Code, provide the method of purchase and the terms and provisions as to forfeiture and as to rights of assignees. These sections are not quoted *in extenso,* it being thought that no controversy as to the said sections can arise. It would seem that the purchaser of said lands stands in about the same relation to the state, as to his rights under the contract, and the state's rights as against him, as any vendee stands to any vendor. From the last section of the statutes cited, it is apparent that the assignee of the state's vendee "shall have the same rights in all respects as the original purchaser," of the same class of land. It is submitted that just as any vendee under a contract of purchase of real estate is treated in equity as having the actual title, subject, of course, to his compliance with the terms of the contract; and just as any assignee of such vendee is considered as having stepped into the shoes of his assignor, with no higher rights than the assignor; so in the case of a vendee of public school lands, the said vendee in equity has the actual title, and his assignee upon assignment, takes the assignor's rights, just as the assignor left them, subject, if he desire a conveyance of the legal title, to the performance of the conditions which his assignor contracted to perform. No distinction can be seen between the case of a vendee of

public school lands, and a vendee of any private property. If this theory be correct, then under the doctrine of after acquired title, which obtains in this state, as well as in United States generally, then by reason of the warranty which Cyrus gave the Railway Company, and by reason of the contract which Cyrus obtained from the State of Washington, then *eo instanti* when the contract of Cyrus was made with the state, such title as he thereby secured inured to the Railroad Company to the extent that Cyrus had previously by warranty conveyed to the railroad. It is true that at this point since Cyrus had but an equitable title, and that the railroad by this inurement up to this point could get nothing higher than an equitable title. Had Cyrus then himself subsequently procured a conveyance from the state, there can be absolutely no question that the title of the Railroad Company would then have been flawless.

But Cyrus, on February 20th, 1908, assigned his contract to appellants. What then was the position of appellants? Appellants thereby stepped into the shoes of Cyrus and became the equitable owners of the land, subject to the performance of the conditions which Cyrus had assumed to perform to the State of Washington. It is clear also, that by reason of the prior recording of the railroad's grant from Cyrus,

that the appellants had constructive notice of the claims of the railroad, and of Cyrus' conveyance by warranty deed. It is also admitted in the answer, as well as alleged in the bill, that the possession, occupancy and use of the railroad company was open, notorious, peaceable and uninterrupted, save for the acts of these appellants. It is therefore admitted that appellants had actual notice, as well as constructive notice by reason of the recording of Cyrus' conveyance to the railroad. It follows, therefore, first, by reason of the constructive notice, and *a fortiori* by reason of the actual notice, that appellants took this assignment subject to all the rights of the railroad company against the assignor of appellants. Consequently, when the appellants took the assignment, the equitable title of the Railroad, which inured to it by reason of the after acquired title of Cyrus, persisted by said inurement and by said assignment, even as against the appellants.

Curiously enough but five days elapsed after the assignment of Cyrus to appellants, before the appellants received a deed from the State of Washington. Under the rule as to after acquired titles, the title of the Railroad Company, then *eo instanti,* was raised from an equitable title, to the extent of Cyrus' grant, to a legal title to the whole amount of the grant.

The reason usually assigned for the doctrine of after acquired title is, first, that it may prevent circuity of action. Thus, if A purports to convey to B, when A has no title, giving warranty, then when A does secure title and sues B in ejectment, the court will not give relief to A, because thereafter at once B will have a right to come into equity and require A to make a conveyance to him. Another reason assigned is that A will not be permitted to say that he has title, as against B, and is estopped to assert such title, because to do so would be to perpetrate a fraud upon B. It is therefore often said that in such a case when A does secure title, B secures title by the feeding of the estoppel. No distinction is made as to assignees of A, if said assignee took either with constructive or actual notice of B's prior rights. In support of this position, appellee submits the following cases:

In Osborn v. Scottish American Co. Limited, 22 Wash., 83, it was held that where the mortgagor did not own all the land described at the time of giving the mortgage, but subsequently acquired title to sufficient land to meet the description in the mortgage, such after acquired title would inure to the benefit of the mortgagee.

The case of Weber v. Laidler, 26 Wash., 144 is

especially interesting. In that case a mortgage was given by one acquiring land as a homesteader, before the obtaining of a patent. After obtaining patent the mortgagor conveyed to Laidler. The mortgagee assigned to Weber. Upon default being made in the payment of the notes and the mortgage, an action to foreclose was commenced, in which the patentee's assignee was joined, as claiming some right. This assignee set up the conveyance to him by the mortgagor, after the mortgagor had obtained the patent, and set up further that under section 2296 of the Revised Statutes of the United States, which provided that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt, contracted prior to the issuing of the patent therefor," the mortgagor had no title at the time of the giving the mortgage. A demurrer to this defense was sustained, and an appeal therefrom taken. Upon appeal the court held, first, that this section of the Revised Statutes had reference only to involuntary alienations of the land, and did not prohibit the giving of a mortgage.. It held further that the title which the mortgagor obtained when the patent was issued to him, inured to the mortgagee under the familiar rule as to after acquired title. The court, therefore, affirmed the

sustaining of the demurrer, and the decree thereupon entered, foreclosing the mortgage. At page 152 the court says:

"As heretofore stated, if the ordinary rule of estoppel is not invoked here, it must be because it is prohibited by the Federal Statute. But, since we have seen that the statute is not intended as a prohibition, the general doctrine of estoppel must apply to this case as to any other case where lands are mortgaged by one not having title, but who afterward acquires title. When a person contracts an obligation to another, and grants a mortgage on property of which he is not then the owner, the mortgage is valid if the debtor ever afterwards acquires the ownership of the property by any right. 2 Herman, Estoppel, Sec. 895, p. 1018."

In the case of West Seattle Land and Imp. Co. v. Novelty Mill Co., 31 Wash., 435, the same doctrine was applied. In that case the plaintiff conveyed to the defendant, by quit claim deed, with expressions amounting to warranty, certain land to which it had not then title, for the purposes of erecting a flour mill thereon. This mill was erected. Subsequently the plaintiff acquired title to the land from the State of Washington. It was held that the defendants obtained the legal title under the familiar doctrine of estoppel.

In Peoples Savings Bank v. Lewis, 37 Wash., 344, a mortgage foreclosure case, the same rule was applied, even as against the mortgagor's assignee. This

also was a case in which the after acquired title came from the State of Washington. The case of Weber v. Laidler, 26 Wash., 144, cited supra, was expressly affirmed.

In Showalter v. Sorenson, 39 Wash., 621, the same rule is applied, as against a vendor, who sought to defeat an action for specific performance, brought by his vendee. The vendor had not the title at the time of the contract of sale, but subsequently acquired it. The court, at page 623, says:

"The vendors should not now be heard to say that they will not comply with the contract, because at the time of its execution they were unable to do so, the obstacle in the mean time having been removed."

The case of Gough v. Center, 57 Wash., 276, was one in which ejectment was brought by a person deraigning title through a mortgage foreclosure sale on execution. In this case the doctrine of after acquired title by estoppel, was again expressly approved, but here the court notices the express statute of the State of Washington as to after acquired title. Quoting from page 278, the court says:

"The only remaining question is the sufficiency of the respondents' proof of title. Rem. & Bal. Code, Sec. 8765, provides as follows:

'Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter

sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such land to whom such deed was executed and delivered, and to his or their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands, and to his or their heirs and assigns, and shall thereafter run with such land.'

This rule prevails generally, independent of statute. 2 Devlin, Deeds (2d ed.), Sec. 944 *et seq.* A title obtained through mortgage foreclosure is no exception to the rule. People's Savings Bank v. Lewis, 37 Wash., 344, 79 Pac. 932; Jones, Mortgages (5th ed.), Sec. 679; Wiltsie, Mortgage Foreclosure, Sec. 391."

The court says further at page 278:

"We apprehend a deed is always void, or at least ineffectual, where the grantor has no title at the time of its execution, but this is no objection to the application of the rule that an after-acquired title passes by estoppel."

There is also a very interesting line of decisions by the U. S. Supreme Court. In Bush v. Person, 18 Howard, 82; 59 L. Ed., 273, it is held that the personal discharge in bankruptcy of a covenantor, does not free him from an estoppel arising by law from his prior covenant of warranty of title and against encumbrances in his deed, and that if the covenantor of title of lands be afterwards discharged in bankruptcy and subsequently acquires title by an encum-

brance which his covenant warranted against, he is estopped as against his covenantee from asserting it, notwithstanding his discharge.

In the case of French's Lessee v. Spencer, 21 Howard, 228; 16 L. Ed., 97, it is held, quoting from the headnote, that "where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him, shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance."

This case is interesting as showing that the rule applies as against all those in privity with the grantor.

There is a careful discussion of this rule in the case of Moore v. Crawford, 130 U. S., 122. In this case Moore, having no title, conveyed to Monroe. Later, planning to avoid the rule as to after-acquired title, Moore procured a conveyance to be made to his wife. The court found that she had knowledge of the facts. It was held, first, that when one conveying with warranty has no title, and subsequently procures it, that he then becomes a trustee for his prior conveyee, and that if he then conveys to a third person,

that third person holds the title impressed with the same trust. Further, if a conveyance is secured to a stranger, for the purpose of defeating the trust, that the trust will still persist, even in the case of the stranger. It should be added that in this case Moore did have a contractural right to secure the property at the time he conveyed to Monroe. This case is interesting as bearing upon the situation in which Cyrus was, or soon became, with reference to the Railroad and the State of Washington, with whom he had contracted. It is also interesting when it is noted how soon after Cyrus' conveyance to the appellants, appellants obtained a deed from the State of Washington.

In the case of Thomas Ryan v. The United States, 136 U. S., 63; 34 L. Ed., 447, the same doctrine is approved in very strong language. Attention is called to the long paragraph in the opinion of Justice Harlan, beginning at the bottom of page 454, in the Lawyers' Edition. This case is authority for the rule, even as against those in privity.

The case of Jenkins v. Collard, 145 U. S., 546; 36 L. Ed., 812, raises the question in a curious manner. According to the fifth headnote in the Lawyers' Edition "where one whose land was sold under the Confiscation Act, subsequently and before the Proclama-

tion of Amnesty and Pardon by the President, deeded the same, with covenant of seizin and warranty, and afterwards received such pardon and amnesty, he and his heirs are estopped by such covenant, from claiming title to the land, as against such grantee, his heirs and assigns.

Says the court in the last paragraph of the opinion:

"Admitting that he had no present estate in the premises, and none in expectancy, he was at liberty to add to his deed the ordinary covenants of seizin and warranty, and the same legal operation upon after acquired interests must be given to them, as when accompanying conveyances of parties whose property has never been subject to confiscation proceedings. That warranty estopped him and all persons claiming under him from asserting title to the premises against the grantee and his heirs and assigns, or conveying it to any other parties."

See also U. S. v. California & Oregon Land Co., 148 U. S., 31; 37 L. Ed., 354, at the bottom of page 361.

There is, of course, absolutely no question as to the inuring of after-acquired title with respect to the estoppel-asserter's grantee. That is, to B's transferee in the assumed case of A to B, A having no title and subsequently acquired it.

See Martindale Law of Conveyancing (St. Louis, 1882), Sec. 169; see also Washburn on Real Property,

5th Ed., Vol. 3, Secs. 50, 50a and 51 at page 128, in which the law is stated clearly and admirably. Did space permit, appellee would like to set out these sections *in extenso*. In view of these authorities appellee submits that it is absolutely clear that when appellants took the assignment from Cyrus, they took it subject to the inurement of equitable title in the Railroad Company, and that when appellants received the deed from the State of Washington, at that instant title in the Railroad Company was perfected by inurement, to the full extent of the conveyance from Cyrus to the Railroad. The fact that Cyrus conveyed the rights as to the pipe line to appellee's predecessor in ownership and operation of the railroad, which predecessor transferred all its rights to the appellee, cannot, of course, make the slightest difference. It is assumed that no criticism will be offered against this appellee, by reason of its being an assignee of Cyrus' grantee. If, now, appellee's theory as to prior appropriation to a beneficial use, and appellee's second theory of title by the feeding of the estoppel by them, fail to convince the court that the decree entered herein was proper, still appellee submits a further theory upon which it is confident the court will affirm the decree. The appellee states as its third

PROPOSITION:

That when a license has been given by a land owner to a person or corporation, to go upon his land for the purpose of laying a pipe line to convey water from a spring to its water tank, and when such person or corporation has gone upon the said land and made the said improvements, making large expenditures therefor, that this license then becomes irrevocable, so long as use is made of it. In support of this proposition, the court's attention is called to the case of Rerick v. Kern, 14 Sargeant & Rawle, 267, reported again in 2 American Leading Cases, Hare & Wallace's 5th Ed., at page 546, and the note thereto beginning at page 549 and especially at 570 to 578.

As stated in the headnote in 2 American Leading Cases, p. 546:

"An executed license, the execution of which has involved the expenditure of money or labor, is regarded in equity as an executed agreement for a valuable consideration, and as such will be enforced, even when merely verbal and relating to the use or occupation of real estate."

In this case, quoting further from the same pages:

"This was an action on the case, brought for diverting the water of a stream, and thereby injuring the plaintiff's mill. It appeared at the trial, that the water had been turned into the channel leading to the mill in question, by a structure erected for the purpose on the land of the defendant, under a license from him; and that he had subsequently removed this

structure, and suffered the stream to return to its former course, which was the injury complained of. Evidence was given by the plaintiff for the purpose of showing that he had erected his mill on the faith of the authority given by the defendant, to divert the stream in such a manner as to furnish a supply of water, and that the revocation of this authority, would render the mill unserviceable, during a considerable portion of the year. Under these circumstances, it was contended that the license was irrevocable."

The attention of the court is next called to the case of Curtis v. La Grand Water Co. (Oregon, 1890), 23 Pac. Rep., 808. In this case it seems that plaintiff's predecessor in title had permitted the Water Company to erect a dam, and to divert water for the supplying of a certain town. Plaintiff's grantor subsequently conveyed to the plaintiff, and subsequent thereto the Water Company removed its dam to a point further up the stream, from which it continued to divert the water. The court holds finally that as to this second diversion, for the purpose of preventing which this action was brought, there was no license as against this plaintiff, but the court argues the matter very fully as to license with respect to the old location.

The court first holds that no right by prescription was acquired by the defendant, upon the presumption of a grant, for the reason that the possession must be

adverse, and that if the inception of the user was permissive, it could not avail to work an ouster.

At page 810 of the opinion the court says:

"The next and main defense is that the defendant constructed its dam and laid the pipes on the land, and diverted the waters for the uses specified, at the place designated on the stream, by the permission or under a license from Arnold, who was then the owner of the land through which the stream flowed, and that, in consequence of large investments of money and labor expended in the construction of such a dam and laying such pipes for the purpose of diverting the waters of that stream, the license has become irrevocable, or turned into an agreement which equity will enforce. The principle on which this contention is based is that after one has acted on the faith of a parol license, and made permanent improvements, the owner will be estopped from revoking his license, to prevent injustice. The application of this principle of equitable estoppel after one has acted on the faith of a parol license is strongly resisted by some authorities, holding, in effect, that it operates to overturn the statute of frauds, and, for all practical purposes, to create an interest in land in disregard of the requirements of that statute. A license creates no interest in land. It is founded on personal confidence, and is not assignable, and its continuance depends on the pleasure of the party giving it; and it is revocable, unless executed under such circumstances as would authorize the interference of equity to prevent injustice. At law a license could not have the effect to create an interest in lands upon the theory of becoming irrevocable by estoppel, as courts of law deal with the legal aspect of estates in land, and cannot enforce equities which grow out of an equitable estoppel against the owner of land. Judge Cooley seems to regard it as a serious reproach to

the law that it should fail to provide some adequate protection against the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements. Maxwell v. Bridge Co., 41 Mich., 467. But it is unnecessary for us to consider the effect of such a position at law, as it is only the equitable rights of the parties that are now under inquiry. An executed license is treated like a parol agreement in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given, or had the effect, to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel. The ground of the jurisdiction is to prevent injustice or fraud."

And again, at page 810 of said opinion, the court says:

"The testimony of Green Arnold, a witness for the defendant, shows that he was the owner of the land, and gave the La Grande Water Company permission to take the water and the right of way for the use of his land for the construction of the dam and laying of the pipes. In order to show in what his permission consisted, he testified that he assisted in putting in the dam and starting the waterworks; and, so far as he is concerned, he consents to the change of location from the place of diversion, and the removal of the pipes, etc., to the land of Chaplin. In short, it is clear that what was done by the company was done not only with his consent, but he in-

tended it to induce the construction of the works, and the diversion of the water for the uses specified. Other testimony there is in corroboration of this, but further reference is unnecessary. Upon the undisputed facts, as between him and the defendant, if he were to attempt to revoke his license to use his land and divert the water for the purposes indicated, a court of equity would apply the doctrine of equitable estoppel, and enjoin him. As against him and the plaintiff, then, who subsequently purchased a piece of the land through which the stream flowed, it may be assumed that the license is irrevocable so long as the interest created by it endures."

This case, it is submitted, is absolutely decisive of the question at bar. If the Railroad Company secured no rights by reason of its appropriation to beneficial uses, and if the Railroad Company did not in fact, under the doctrine of after-acquired title, secure a legal title to the extent of Cyrus' conveyance, when the appellants received the legal title from the state, surely it will not be denied that the appellee, at least, made its license to use the land and the spring, irrevocable by building the said pipe line and tapping the spring, and by building and maintaining the water tank, with the expenditure of a large amount of money. This question of irrevocable license it would seem, is absolutely independent of any consideration of the rights of the State of Washington. Appellee cannot conceive what application of law can be made, which will involve the State of

Washington in this dispute, and respectfully submits that no error assigned by appellants was committed, and that the decree should be affirmed.

Respectfully submitted,

L. F. CHESTER,

WILLIAM A. MONTEN,

Solicitors for Appellee.

No. 1914.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. TOLLIVER and SOPHRONIA TOLLIVER, his wife,

Appellants,

vs.

THE GREAT NORTHERN RAILWAY COMPANY, a corporation,

Appellee.

POINDEXTER & MOORE,

and

C. C. BRYANT,

Solicitors for Appellants.

O. C. MOORE, *of Counsel.*

APPELLANTS' REPLY BRIEF.

Filed this ..... day of February, 1911.

F. D. MONCKTON, Clerk,

By ..... Deputy Clerk.

COLE PRINTING COMPANY

No. 1914.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. H. TOLLIVER and SOPHRONIA TOLLIVER, his wife,
Appellants,
vs.
THE GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellee.

POINDEXTER & MOORE,
and
C. C. BRYANT,
Solicitors for Appellants.
O. C. MOORE, *of Counsel.*

APPELLANTS' REPLY BRIEF.

I.

The contention that appellants are estopped to question respondent's claim of title under the deed executed by Cyrus in September, 1899, was rejected by the lower Court and the relief granted was based entirely on the ground of a prior appropriation by appellants of the

water rights in question. (Tr., p. 21.) Hence we did not deem it proper to anticipate respondent's contention on that point in this Court. It should be borne in mind, in considering this point, that the Cyrus deed relied on by appellants was executed in September, 1899 (Tr., p. 10), at a time when Cyrus had no interest whatever in said lands, neither present or prospective, and the executory contract or option for the purchase of said lands from the state was not entered into until the 27th of October, 1905, more than six years after the execution of the deed referred to, and this is the contract that was thereafter assigned to Tolliver in February, 1908. (Tr., p. 32.) Hence the title to the land on which the spring in question is situate was vested in the State of Washington in trust for school purposes under the terms of the enabling act and the state constitution until deeded to appellant Tolliver in 1908.

Under the first head respondent cites the case of Peterson v. Baker, 39 Wash. 275, which simply holds that a public highway can be established by prescription across school lands in the State of Washington under Sec. 2477 U. S. Rev. Stat., enacted in the year 1876, where such road was established and had been maintained from a time antedating said statute. Sec. 2477 U. S. Rev. Stat. is as follows:

> "The right of way for the construction of highways over public roads, not reserved for public use, is hereby granted."

It was contended that Secs. 16 and 36 of the public lands of the United States within the Territory of Washington were by the terms of Sec. 1947 *RESERVED FOR*

PUBLIC USE (italics ours) within the meaning of Sec. 2477, but the Supreme Court of Washington held that the act of 1853 did not constitute a reservation, but simply a declaration of governmental policy respecting the title to Secs. 16 and 36 of the public lands, and that it was within the power of Congress, so long as said lands had not been dedicated for a particular purpose, to alter that policy, which it had, in fact, done by the act of 1876, Sec. 2477 U. S. Rev. Stats.

In other words, said highway had become established prior to the admission of Washington as a state in the Union and no reference whatever is made to the provisions of the enabling act by which said lands were, on the admission of Washington as a state, definitely transferred to the state in trust for the benefit of public schools.

As stated in the opinion in Peterson v. Baker, "The act of March 2, 1853, was simply a declaration of governmental policy," while we contend, on the other hand, and it certainly cannot be consistently questioned, that by the terms of the enabling act the title or fee to said lands was actually transferred to the State of Washington, for a designated purpose and subject to certain safeguards, among which is the inability of the State of Washington to divest itself or allow itself to be divested of the title to said lands except for cash and on the terms designated by said enabling act. Clearly Peterson v. Baker does not control the question here presented.

The only other authority cited under the first head requiring notice is that of O'Brien v. Wilson, 51 Wash. 52,

and it seems to us that respondent's statement that the Court held:

> "Simply that title to school lands could not be acquired by adverse possession as against the state, and that a person who purported to hold possession adversely to the state, thereby acquired no rights, as against one who subsequently and properly was given title by the state,"

precisely states appellants' position and established conclusively the inapplicability of the opinion in that case to the question now under consideration, since we have here a railroad company claiming to have held possession and acquired rights adverse to the state and now asserting same against one who has "subsequently and properly" been given title by the state.

II.

The amended complaint does not charge the existence of any fraud or collusion between Cyrus and Tolliver, nor that the state school land contract was assigned to Tolliver with any purpose to circumvent the rights of respondent.

That an after acquired title of a vendor inures to the benefit of the vendee is a fundamental rule of law, and we have no quarrel with the numerous authorities cited by respondent in support of that proposition, but those authorities have no application whatever to the facts involved in the present controversy. Nor has the case of Moore v. Crawford, 138 U. S. 122, and those based thereon, any place in this discussion, since, in that case, it was charged and established that Moore conveyed to his wife, with the express purpose of avoiding, by his own fraudu-

lent act, the effect of the rule concerning after acquired title. This, of course, could not be done. The Court held that the wife, taking title under those circumstances, became a trustee *ex male ficio* for the benefit of her husband's prior grantee, but, as above noticed, no charge whatever of fraud is brought against the appellants in this suit.

Without stopping to analyze or discuss them at length, we submit that neither the case of Ryan v. U. S., 136 U. S. 63; Jenkins v. Collard, 145 U. S. 546, nor U. S. v. Cal. & Ore. Land Co., 148 U. S. 31, have any bearing whatever on the questions or issues here presented. Respondent also cites the case of French's Lessee v. Spencer, 21 Howard, 228; 16 L. Ed. 97, to the effect that the rule respecting after acquired title applies, not only to the grantor, but to all persons in privity with him, which rule is, of course, well established. However, it is without force or effect here for the reason that Cyrus, by whom the deed of 1899 was executed, is not in privity with appellant Tolliver. Cyrus had no interest whatever in said lands at the time of the execution of said deed in 1899, and while he acquired an inchoate or optional executory contract in 1905, he did not acquire title to the lands nor any further or additional right thereto.

> "The term 'privity in estate' denotes mutual or successive relationship to the same rights of property."
>
> *Mygatt v. Coe,* 11 L. R. A. 647, 649.
>
> "By 'privity' is meant the mutual or successive relationship to the rights of property, and privies are classified according to the manner of this rela-

tionship. They are privies in estate, as donor and donee, lessor and lessee, and joint tenants.

Ahlers et al. v. Thomas et al., 56 Pac. 94.

"A privy in estate is a successor to the same estate, not a different estate in the same property."

Pool v. Morris, 74 A. Dec. 68, 70.

Sec. 8765 of Rem. & Bal. Code, cited by respondent, is as follows:

"Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a *title* to such lands so sold and conveyed, such *title* shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his or their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands, and to his or their heirs and assigns, and shall thereafter run with such land."

It is important to note that said statute provides that an after acquired *title* shall inure to the benefit of a previous conveyee. Therefore, it is important to ascertain when and by what means a land title may be acquired in the State of Washington, and this question is clearly answered by Secs. 8745 and 8746 of Rem. & Bal. Code, which are as follows:

Sec. 8745:

> "All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed."

Sec. 8746:

> "A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgment of deeds."

The above statutes specifically provide that all conveyances of real estate shall be by deed, which is simply another way of stating that *title* cannot be transferred except by deed. Yet, Sec. 8765 of the Code, cited and relied on by respondent, only provides for the inuring of an after acquired title to a previous grantee. Title was never vested in Cyrus, but was at all times vested in the state until transferred to appellant Tolliver on February 25, 1908. Hence, there was no privity of title between Cyrus and Tolliver, and, since the inchoate right acquired by Cyrus under a contract with the state did not come within the terms of Sec. 8765 of the Code respecting the inuring of an after acquired title, Tolliver was not brought within the terms of that statute by the assignment to him of the executory contract held by Cyrus.

The case of Rerick v. Kern, cited under the last head on page 33 of respondent's brief, is not in point here for the reason that the first premise, to-wit, the giving of a license by the original owner, on which the opinion of the Court in that case was based, does not exist here, and

the same may be said of Curtis v. LeGrande Water Co., 33 Pac. 808, cited on page 34 of respondent's brief, for the simple reason that, as heretofore urged, no right or license of any kind or character could accrue against the state by reason of the occupancy of said lands while their title remained in the state under the terms of the federal grant.

The proposition that a license cannot be obtained against the State of Washington by estoppel through the mere failure of the state to interfere with the occupancy of its property, nor even by the collection of taxes on buildings located thereon, was distinctly held in the case of Brace & Hergert Mill Co. v. State, 95 Pac. 278, 279, in which case the Court said:

> "Lastly, it is asserted that the state is estopped from asserting title to the property in question. This contention is founded on the fact that the state has not interfered with the appellant's use of the property, but has stood by and raised no question while the appellant and its predecessors in interest have mortgaged and sold the property, paid taxes thereon, and otherwise treated it as their own. But acts of this character do not amount to an estoppel as against the state. The state at all times has recognized that the appellant had a property in its improvements, and this property it recognized the right to dispose of as it pleased. The improvement was property subject to taxation, and it could be no waiver of the state's title to the land to assess and collect taxes upon the appellant's interests therein. If the authorities sought to tax the appellant for something it did not own, the proper remedy was to object before the taxing board."

This latter case establishes a rule of property within the State of Washington and is for that reason, we suggest, of controlling influence with this Court.

Respectfully submitted,

POINDEXTER & MOORE, *and*
C. C. BRYANT,
Solicitors for Appellants.

O. C. MOORE, *of Counsel.*